

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:
From July 1, 1936
Through September 30, 1936
VOL. IV

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act of the Legislature of Alabama found on page 1114 of the General Acts of Alabama, Regular Session 1935, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from July 1, 1936, through September 30, 1936.

The Act referred to above requires that six copies of this Quarterly Report be sent to each of the probate Judges in the State and that the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, and the County Superintendent of Education.

Respectfully,

A. A. CARMICHAEL,
Attorney General.

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OPINIONS



July 1, 1936.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

County not liable for injury sustained on bridge unless negligence and statutory requirements imposing liability on county concur.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of May 1, 1936, in which you request my opinion as follows:

"We had the abutment of a bridge of one of our county roads washed out after dark one night from a heavy rain. Before day light of the same night, a citizen of the County, attempting to pass the bridge, his car was damaged to the amount of \$25.00. We think this is a reasonable damage.

"Please advise at your earliest convenience if we can pay injured party this amount of \$25.00."

I am of the opinion that the facts as set forth by you, are not sufficient to show liability on the part of the county, and without further facts, showing such liability, the county would not be authorized to pay damages.

In general a County is not liable for injuries occurring on a bridge which was not constructed or erected by the county, or which was constructed or erected by the county without the intervention of an independent contractor (in the absence of statute imposing liability). The county is liable under certain circumstances when the bridge is constructed by independent contractors. (Section 6457, Code of 1923).

The question of whether or not the county was negligent is an important element. In this connection, I suggest that you read *Hovater v. Franklin County*, 217 Ala. 439; 116 So. 526 (1928), which is an action for failure to maintain a railing along the side of a bridge. In that case the allegation was very similar to the matter as stated in your letter, the complaint merely alleging that "the railing along the side of the bridge was down" and that this resulted in the plaintiff's injury.

The court said that this complaint did not show any negligence on the part of the county or its officials and of course, no negligence would be presumed. In the words of the court:

"* * * this complaint nowhere alleges negligence on the part of the defendant or its officials. A complaint may state facts from which negligence appears as a necessary concomitant. Such complaint to be good must at least exclude the probability that the injury resulted from other than negligence, want of the degree of care imposed by law in the circumstances. The complaint does not meet that test. Construed against the pleador, it shows a railing was maintained, but was down for some undisclosed cause at the time, and for ever so short a time prior thereto.

"The law, in the absence of averment, does not presume a failure of duty on the part of public officials. The complaint should show it was

down or had not been remedied by reason of negligence." (Italics supplied).

It would not be proper for a county to pay damages in the sum of \$25.00, regardless of how reasonable such damages might be, unless those elements existed which created liability on the part of the county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 1, 1936.

Hon. H. E. Williams,
County Supt. of Education,
Lauderdale County,
Florence, Alabama.

County Board of Education of Lauderdale County not authorized to expend funds for purpose of paying hospital bills, actual expenses of, and buying artificial foot for, child injured by school bus through no fault of the driver.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 7, 1936, which follows:

"A school bus ran over a child here and injured it so that one leg had to be amputated. The accident was not due to any fault of the driver but the County Board would like to pay the hospital bill and actual expenses and buy an artificial foot for the child if such can be legally done. Please advise if the County Board of Education can pay above expense."

In reply, I wish to advise that it is my opinion that the County Board of Education of Lauderdale County cannot legally expend the school funds of said county for the purpose indicated in your letter.

To make such an expenditure would be a mere gratuity on the part of the County Board of Education of Lauderdale County, since a County Board of Education cannot be sued in tort for damages.

"Suit against the county board of education is, in effect a suit against the State and cannot be maintained. Constitution of Alabama, 1901.

"Even where authority to sue a governmental agency of the State is given by statute, such authority does not extend to suit upon a tort for damages. *White v. Insane Hospital*, 138 Ala. 479." Biennial Report of Attorney General, 1926-28, page 730.

But, under the facts stated by you, the driver of this school bus was not at fault, so there is not even a moral obligation on the part of the County Board of Education to make such an expenditure, much less a legal obligation.

A County Board of Education can only make such an expenditure of the school funds as it is authorized to make by statute.

"An administrative board or other agency, the creature of legislation, has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a 'thus saith the law' for every disbursement.

"Unless a given charge on such fund is expressly or impliedly authorized, it cannot be lawfully incurred.

"No such power is implied unless an intention to confer it can be seen from the entire scheme of legislation; implied because incident to, and embraced within, express powers.

"This familiar rule, as applied to use of public funds, has often been held binding upon local governing bodies having a quantum of legislative authority, such as the governing bodies of counties.

"It is an essential safeguard, and should never be relaxed. Every reason demands the same rule shall apply to county boards of education and like agencies." *Woodruff v. Beeland*, 270 Ala. 652

There is no statutory authority for a County Board of Education to expend county school funds gratuitously. Therefore, the County Board of Education of Lauderdale County cannot expend the county school funds of Lauderdale County for the purposes mentioned in your letter.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 3, 1936.

Hon. Fleetwood Rice,
Judge of Probate, Tuscaloosa County,
Tuscaloosa, Alabama.

Judges of Probate—Moneys held as fiduciary fund and deposited in county treasury pending Supreme Court decision should be paid out in accordance with said decision.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 24, 1936, which reads as follows:

"On January 3, 1935 I received of James F. Alston and Forney W. Brandon, executors of the estate of Wm. W. Brandon, deceased, \$5,986.25 for amount of fees and commissions earned by Wm. W. Brandon as Probate Judge and in excess of \$6,000.00 and reasonable expenses of the Probate Office from September 1, 1933 to September 1, 1934. This money was deposited in the City National Bank, Fiduciary Fund, awaiting in trust for disposition by the Legislature or the courts and I gave my receipt to the said executors to the above effect. On the 22nd day of October, 1935 after the passage of the Henley Bill appropriating said funds into the General Fund of the County I transferred these funds to Fleetwood Rice as Probate Judge and Custodian of the funds of Tuscaloosa County and placed them to the credit of the General Fund of Tuscaloosa County.

"The said executors of the estate of Wm. W. Brandon now claim that it has been adjudicated that these funds belong to the estate of said Wm. W. Brandon deceased and are calling upon me as custodian of the funds of Tuscaloosa County to pay the same over to them.

"Question 1. Please advise me whether or not I shall pay said funds over to the executors of the estate of Wm. W. Brandon deceased."

I am of the opinion that your inquiry should be answered in the affirmative.

The moneys paid over to you by the executors of the estate of Judge Brandon, and in turn deposited by you in the County Treasury, belong to the estate of Judge Brandon.—**Houston County v. Martin**, 4th Div. No. 869 (MS). This being true, said moneys should be refunded to the executors of the estate of Judge Brandon.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 6, 1936.

Hon. George C. Johnson,
Solicitor for Limestone County,
Athens, Alabama.

Justices of the Peace—The precinct of Athens, Limestone County, Alabama, is entitled to have two Justices of the Peace.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of June 9, 1936, in which you state:

“The precinct of Athens, Limestone County, Alabama, has only one Justice of the Peace. I understand that under prevailing law each precinct is entitled to two such officials.

“We have in this County created under a local Act of 1931 a Municipal Court which has County wide jurisdiction over misdemeanors; however the act creating this office does not state that it is in lieu of any justice of the peace court or courts in Athens precinct.”

You request my opinion:

“Please advise me whether or not I am correct when I conclude that Athens is entitled to another Justice of the Peace.”

In my opinion you are correct in your conclusion. I have carefully examined Act No. 362, S. 423, approved July 6, 1931, (Local Acts of Alabama, 1931, p. 167), the Act creating the Municipal Court of Limestone County, and it is my opinion that said Court was not created in lieu of all justices of the peace in the Athens precinct, or in the county.

In the case of *State v. Roden*, 15 Ala. App. p. 385, the Supreme Court, in response to questions certified by the Court of Appeals, said:

“We do not mean to hold that there cannot be created inferior courts in cities or incorporated towns having more than 1,500 inhabitants, with jurisdiction in excess of that of justices of the peace, but we do hold that any attempt to dispense with the offices of justice of the peace, except by the creation in lieu thereof of an inferior court in strict compliance with section 168 of the Constitution, is void.”

Section 168 of the Constitution of Alabama provides in part as follows:

"Section 168. * * * Where one or more precincts lie within, or partly within a city or incorporated town having more than fifteen hundred inhabitants, the legislature may provide by law for the election of not more than two justices of the peace and one constable, for each of such precincts, or an inferior court for such precinct or precincts, in lieu of all justices of the peace therein. * * *"

Section 8700 of the 1923 Code of Alabama provides as follows:

"Section 8700. Two justices for each precinct; term of office.—Within the limits of every election precinct there shall be two justices of the peace, elected as provided in the chapter on 'elections', who shall hold office for four years and until their successors are qualified."

As the Municipal Court of Limestone County was not created in lieu of justices of the peace, it is my opinion that the Athens precinct is entitled to have two justices of the peace as provided by the statute, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 7, 1936.

Messrs. J. W. Varnum and C. C. McIntyre,
Members Court County Commissioners,
Houston County,
Dothan, Alabama.

County Commissioners may not purchase equipment or employ workmen under terms of Local Act (1935 Local Acts, p. 74 now repealed), as this authority is granted to the County Road Foreman, who can act only with the approval of the Court of County Commissioners.

Opinion by Assistant Attorney General Knabe.

Gentlemen:

I am in receipt of your letter of May 21, 1936, stating:

"We would like to get your ruling on the following provisions of Section 10 of the Local Acts of 1935, H. B. 533, page 74, known as the Calhoun Bill.

"The provisions of said Act read as follows:

"That said County Road Foreman shall have the general supervision and care of maintaining, repairing and improving the public roads and bridges of the County, and the building of new roads and bridges, when such new roads or bridges are established by said Court of County Commissioners. He shall, with the approval of said Court of County Commissioners, employ and fix the compensation of all agents, assistants, overseers, workmen and laborers required for said work and shall, with the counsel, assistance and approval of said Court, purchase all necessary road machinery, material, teams, tools, supplies, and equipment, as hereinafter provided, used in and about the work on the public roads and bridges of the county and he shall perform all such other duties relating to the maintenance, improvement or construction of highways and bridges as may be required of him by the general laws of the State or by the Court of County Commissioners of Houston County."

"Can the County Commissioners or members of the Board of Revenue purchase the necessary road machinery, material, teams, tools, supplies and equipment that are necessary for the County without the recommendation of the County Road Foreman of said County?

"Can the County Commissioners or members of the Board of Revenue employ the necessary workmen, agents, assistants, overseers and laborers required for the said County without the recommendation of the County Road Foreman?"

I am of the opinion that Section 10 quoted in your letter makes it mandatory that the County Road Foreman shall make purchases and employ workmen. The provision of this Act is that the County Road Foreman "shall with the approval of said Court of County Commissioners employ and fix the compensation of all agents, assistants, overseers, workmen and laborers required" and shall "with the counsel, assistance and approval of said Court purchase all necessary road machinery * * *". (Underscoring supplied.)

In defining the powers and duties of the Court of County Commissioners in Section 6, the Act gives such Court only authority "not inconsistent with the provisions of this Act". In discussing the powers of this court, the Supreme Court of Alabama in *State ex rel. McIntyre v. McEachern*, 166 So. 36, said "nothing will be presumed in favor of the jurisdiction of a court with special and limited powers." I believe that the provisions of Section 10 confer authority on the county road foreman inconsistent with the exercise of the general right of a board to employ workmen and make purchases.

I have not overlooked Section 13 which mentions contracts "made and entered into, or purchases made by the Court of County Commissioners or County Road Foreman of Houston County", which reference might indicate that it was intended that the Court of County Commissioners had authority to make contracts. However, I am of the opinion that the use of the word "all" in Section 10 is conclusive on this subject and that employment and purchases as set forth in the Act must be made by the County Road Foreman, subject to the restrictions provided in the Act. (See opinion addressed to Hon. J. J. Whiddon, Court of County Commissioners, Dothan, Alabama, under date of June 13, 1935, Book 4-A, page 164, and opinion addressed to Hon. Saxon P. Poyner, Judge of Probate, Dothan, Alabama, under date of June 10, 1935, Book 4-A, page 115).

I am sure you are aware of the fact that the act about which you inquire was repealed by an act approved September, 1935, (1935 Local Acts, page 253). For your information, however, the provisions of the new act are very similar in respect to the matter in which you are interested.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 7, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Statutes—Acts 1935, page 239 providing for payment of certain fees and costs in the so-called Scottsboro Cases, does not provide appropriation for payment for additional lighting or equipping of the County Jail.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Hon. J. E. Reid, Clerk of the Circuit Court of Jackson County, Alabama, has rendered a bill to this office for payment in accordance with provisions of House Bill No. 609, Governor's Bill No. 190, Page 239, 1935 General Acts.

"Included in this bill we find an item of expenditure covering the cost of installation of electric lights in the Jail Yard, by the Alabama Power Company, amounting to the sum of \$46.80 with the notations, "Instructions of the Presiding Judge". An item of 12 Bunks installed in Morgan County Jail, \$180.00. 12 Cot Pads and 12 Cot Blankets, \$84.60.

"Will you please advise us if we may pay these items of expenditures in accordance with the provisions as set forth in the bill."

Act 190 (Acts 1935, page 239) does not purport to make an appropriation for lighting or equipping the County Jail. It provides funds for those purposes only specified therein.

By no stretch of the construction of the language employed by the Legislature, can the conclusion be drawn that it was thereby intended to provide funds for the payment of any and all of the things necessary in the safe-keeping of the prisoners, or the trial of the cases, therein mentioned.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 7, 1936.

Hon. G. H. Howard,
Probate Judge,
Elmore County,
Wetumpka, Alabama.

Amusement and entertainment license—Persons paying license prescribed by Schedule 8 of the Revenue Bill of 1935 exempt from license imposed on merry-go-rounds, etc. (Schedule 64) but liable for license for sale of bottled drinks and operation of lunch counter.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 20, 1936, in which you request my opinion as follows:

"Please advise me your opinion as to the application of Schedule 8 of the license schedule for permanent amusement parks.

"You will notice it names 'That persons who take out that license may be exempted from licenses or privilege tax on amusements and entertainment.' Will an operator under this schedule be exempt from all licenses for other business in connection with amusement park, such as, merry-go-round, flying jennies, lunch counter and bottle drinks?

"If ladies in the community want to take out license for permanent amusement park, could they employ a party with his own outfit, that is, merry-go-round, flying jenny, etc., and be exempt from payment of any of these licenses? Would the payment under Schedule 8 exempt them from a license to operate a lunch counter and sell bottle drinks?"

Schedule 8 of the Revenue Bill of 1935 provides, in part, as follows:

"Schedule 8. Owners and operators of permanent amusement parks which shall be open for the public for not more than five months of each year may be exempted from payment of the license or privilege taxes on amusements or entertainments licensed by this Act, provided they take out and pay for a license to operate a permanent amusement park at the following rates to-wit: * * *"

In my opinion, an operator of an amusement park who pays the license prescribed by this schedule would be exempt from payment of the privilege license imposed by Schedule 64 of said Revenue Bill upon flying jennies, merry-go-rounds, etc.

"Entertainment" denotes that which serves for amusement, and "amusement" is defined as a pleasurable occupation of the senses, or that which furnishes it, as dancing, sports or music. **Young v. Board of Trustees of Broadwater County High School**, 4 P (2d) 725, 726 (Mont).

In view of this definition it would appear that it was not intended that owners and operators of permanent amusement parks which shall be opened for the public for not more than five months should be exempt from the payment of the license prescribed for persons operating lunch counters and selling bottled drinks. Accordingly, if the ladies in your community desire to pay the license prescribed for the permanent amusement park they may do so and be exempt from the license imposed upon persons operating merry-go-rounds, flying jennies, etc., but would be liable for the license for operating a lunch counter and dispensing bottled drinks.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 7, 1936.

Hon. J. R. White,
Chairman, Board of Revenue,
Walker County,
Jasper, Alabama.

Counties—Where debts outstanding as of October 1, 1935 were paid by temporary loan rather than refunding warrants, refunding warrants may now be issued under the provisions of Act No. 379, H. 191, approved September 9, 1935 (General Acts 1935, p. 803), known as the County Financial Control Act.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 24th, 1936, which is as follows:

"I would like to have your opinion as to whether or not Walker County may borrow money or issue interest bearing warrants under the

provisions of the emergency clause or any other provisions of the County Financial Control Act under the following circumstances and for the following purposes:

"On October 1, 1935, there were outstanding obligations against the general fund of the county of approximately \$10,000. A temporary loan was made in the sum of \$12,000 which was used to pay these outstanding obligations instead of refunding same which could have been done. Another temporary loan of 95% of the \$12,000 was made in 1936 to repay the 1935 loan.

"As the matters now stand, the County is unable to meet its obligation for necessary current governmental operating expenses. This situation arose due to the fact that the claims outstanding as of October 1, 1935, were paid in full by the temporary loan of \$12,000 instead of issuing refunding warrants to cover same. Walker County is within \$250,000 of its constitutional indebtedness."

I am of the opinion that refunding warrants may now be issued up to \$10,000 under the circumstances as above set out.

The situation presented by your inquiry is analogous to the one presented in an opinion rendered to the Judge of Probate of Hale County on February 8, 1936. (Quarterly Report of Attorney General, Vol. II, p. 138). In said opinion it was held that refunding warrants may be issued in a case where a temporary loan was made to pay a debt that was outstanding as of October 1, 1935, under the provisions of Sections 9 and 10 of the County Financial Control Act. Said opinion stated:

"The fact that a temporary loan has been secured to take care of this obligation merely changes the form of the obligation and does not prevent its being a general obligation."

In the instant case refunding warrants could have been issued up to \$10,000 to care for the obligations outstanding as of October 1, 1935. Instead of doing this a temporary loan was made. This merely changed the form of the obligation. Therefore, in my opinion, refunding warrants may still be issued up to \$10,000 to care for the outstanding claim of this amount as of October 1, 1935.

Section 17 of the County Financial Control Act dealing with temporary loans for emergencies does not, in my opinion, apply to the facts set out in your letter. Section 17 deals with situations over which the county governing body has no control.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 7, 1936.

Hon. W. L. Little,
Superintendent of Education,
Cherokee County,
Center, Alabama.

County Board of Education—Members of the County Board of Education are entitled to expenses for only twelve days in any one year.

Meetings of the County Board of Education should be counted from October 1st, the beginning of the fiscal year.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of June 24, 1936, in which you state:

"It is my understanding that under the law the County Board members may be paid for only twelve meetings each year."

You request my opinion as follows:

"1. Is it your opinion that this law prevents their actual expense to and from Board meetings from being paid for attendance on meetings in addition to the twelve allowed by law?

"2. From what date should County Board meetings be counted in determining the number to be held in a year?"

Answering your first question, it is my opinion that the members of the County Board of Education are entitled to expenses for only twelve days in any one year and cannot be reimbursed for the actual expenses incurred in attending meetings in addition to the twelve days as provided by law.—See **Biennial Report of Attorney General, 1930-1932, p. 26**; also **Biennial Report Attorney General 1928-1930, p. 617**.

Answering your second question, it is my opinion that the meetings should be counted from October 1st, the beginning of the fiscal year.—See **Biennial Report of Attorney General, 1926-1928, p. 299**.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 7, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Tax Assessors—entitled to commissions on assessments made by them prior to October 1, 1935, on lands bid in by the State at tax sales, although money would not be received until after October 1, 1935.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 1, 1936, which is as follows:

"The Revenue Code of 1935 effective October 1, 1935, does not give Tax Assessors commission taxes on lands bid in by the State.

"Are Assessors due commissions on assessments made by them prior to October 1, 1935 even though paid from the first monies collected by the Tax Collectors after October 1, 1935?"

I am of the opinion that your inquiry should be answered in the affirmative.

Prior to October 1, 1935, the effective date of the 1935 Revenue Act, tax assessors were entitled to commissions on assessments made by them on taxes on lands bid in by the State. (Section 3040, Code of 1923). Section 24 of

the Revenue Act of 1935 specifically provides that tax assessors shall not receive commissions on taxes on real estate bid in by the State at tax sales. The question then presents itself as to whether or not tax assessors are entitled to such commissions when the assessments are made prior to October 1, 1935, although they would not receive the money until after October 1, 1935.

This office has heretofore ruled that the fees and commissions of a tax assessor accrue when he actually earns same and not when same are paid. In other words, said fees and commissions accrue when the assessments are made.—See **Quarterly Report of Attorney General, Vol. 1, p. 154**, and opinions cited therein.

An application of the above principle to the instant inquiry leads to the conclusion the tax assessors are entitled to the commissions on assessments made by them prior to October 1, 1935, on lands bid in by the State at tax sales. The commissions accrued when the assessments were made although the money would not be received until after October 1, 1935. Section 24 of the Revenue Act of 1935 is not, in my opinion, retroactive.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 7, 1936.

Hon. Cecil C. May, Clerk,
Circuit Court of Butler County,
Greenville, Alabama.

Section 76 of Act approved August 23, 1927, (General Acts 1927, p. 348) while including a misdemeanor and a felony, yet the degree of the offense must be governed by the highest punishment, which, under this law, here is a felony. Therefore, the costs of the prosecution must be collected as in all felony cases.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 24, 1936, in which you request my opinion as follows:

"On April 17th, 1935, we had a conviction in the Circuit Court under Section 76, General Acts, 1927, p. 348-376, Duty to Stop in Event of Accident, and a fine of \$187.50 assessed against him by a jury;

"He took an appeal to Appellate Court, said Appellate Court affirmed the lower court, Opinion rendered January 21st, 1936.

"Heretofore the Supreme Court has held that this was a Felony.

"Now the question is in making up the transcript and cost Bill in this case (The defendant having been sentenced to Hard Labor for 70 days to pay the fine and so many days at 75c per day to pay the costs) should I charge \$30.00 Solicitor's Fee? (for each conviction of felony not otherwise provided for) or should I charge \$10.00 Solicitor's Fee? And should I charge \$4.00 for Arrest Fee (Sheriff's) or \$2.00 as provided under Misdemeanor cases where the defendant is sentenced to Hard Labor?

"Please let me have your Opinion as to Solicitor's and Sheriff's fees in this case by return mail as I have notified the defendant to be ready to report within 15 days from January 21st, 1936."

Under the case of *State v. Hall*, 24 Ala. App. p. 336, I am holding that no matter what the punishment is under the statutes you refer to, the offense is felony and you are authorized to collect costs as in all other felonies; without regard to the punishment, therefore, the Solicitor's fee would be \$30.00 and the arresting fee \$4.00.

I call your attention to Section 3738, Code of Alabama 1923. This has to do with solicitor's fee, and your attention further to subdivision of this Section which is as follows:

"For each conviction of a felony not otherwise provided for \$30.00."

I find no other provision regulating solicitor's fee in this matter, and the Court of Appeals and the Supreme Court have held that no matter what the punishment is that the degree of crime is governed by the highest penalty. Therefore, the statute is declaratory of a felony. See Section 76, General Acts 1927, p. 348, which is as follows:

"Section 76. DUTY TO STOP IN EVENT OF ACCIDENT. (a) The driver of any vehicle involved in an accident resulting in injury or death to any person or resulting in the damage to property, shall immediately stop such vehicle at the scene of such accident.

"(b) The driver of any vehicle involved in an accident resulting in injury or death to any person or damage to property shall also give his name and address, and the registration license number of his vehicle and shall render to any person injured in such accident reasonable assistance, including the carrying of such person injured to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by such injured person.

"(c) Every person convicted of violating this section, relative to the duty to stop in the event of accidents shall be punished by imprisonment in the County or municipal jail for not less than thirty days nor more than one year or in the state prison for not less than one nor more than five years or by fine of not less than one hundred dollars nor more than five thousand dollars or by both such fine and imprisonment. The court shall revoke the permit or license of the person so convicted."

See also *Clifton v. State*, 73 Ala. 473.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

Hon. E. J. Huet, Clerk,
Inferior Criminal Court of Mobile County,
Mobile, Alabama.

1. Highway Officers not entitled to fees in prosecution for an offense under House Bill 112, Acts 1932, page 68.

2. Act 1932, page 102, amending Code Section 3762 not applicable to Inferior Criminal Court of Mobile County.

3. Witnesses—entitled to more than one attendance fee where summoned for attendance in more than one case in one day, where law complied with.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 8, 1936, in which you request my opinion as follows:

"Are highway officers entitled to fees in a prosecution for an offense under H. B. 112, Acts 1932, page 68? Provision is made for such fees in H. B. 113, Act 1932, page 178, but former act is silent as to disposition of such fees.

"Does the Act of 1932, page 102 fixing witness fee of 75c and mileage apply to Inferior Criminal Court (see Act 1907, page 82)?

"Where witnesses are summoned for attendance for more than one case in one day, are such witnesses entitled to more than one attendance fee?"

In my opinion, the answer to your first inquiry should be in the negative.

Statutes giving costs must be deemed and held penal laws and no fees should be taken except as expressly provided by law.

Swindle v. Crocker, 217 Ala. 119, 115 So. 252; Torbert v. Hale Co. 131 Ala. 144, 30 So. 453.

I call your attention particularly to Cabler v. Mobile County, 230 Ala. 118, 159 So. 692, wherein we find the following:

"No proposition is better settled than that the law of fees and costs is penal, to be strictly construed; no fee to be charged nor paid except in the manner provided by law. The office is taken cum onere and services for which no provision for payment is made are gratuitous. Herman v. Mobile County, 202 Ala. 274, 80 So. 112. Kilgore v. Swindle, Co. Trea. 219 Ala. 378, 122 So. 333."

It is not intimated by H. B. 112, Acts 1932, page 68, that the Highway officers are entitled to fees for making arrests under that act. In the absence of a clear authority giving such fees, therefore, it is my opinion that the officers are not entitled to claim same.

For your further convenience and instruction, I enclose herewith copy of opinion to Hon. H. W. Clayton, Clerk of the Circuit Court of Marshall County, Guntersville, Alabama, under date of March 4, 1936, in which this office held that State Highway Patrolmen are not entitled to the arrest fee and attendance fees where arrests are made by them, but that these fees must be collected and transmitted to the Highway Patrol Department.

The answer to your second inquiry must likewise be answered in the negative. The Act approved February 21, 1907, (Local Acts 1907, p. 82), under which the Inferior Criminal Court of Mobile County is now operating, provides in Section 8 as follows:

"That witnesses in cases before said judge of the said inferior criminal court **shall be entitled to the same fees**, to be taxed and collected in the same manner, as is provided in like cases before justices of the

peace, provided that said witnesses shall demand of said clerk in advance of the trial that said fees be taxed and collected for their benefit."

It is to be seen that witnesses in cases before said court are entitled only to the fees provided for witnesses appearing before Justices of the Peace. The Act of 1932 to which you refer amends Section 3762 of the Code of Alabama of 1923, and relates only to the compensation of witnesses as provided in that section, and not to the witnesses appearing before Justices of the Peace. Accordingly, the Act of 1932, is not applicable to the Inferior Criminal Court of Mobile County.

Your third inquiry should be answered in the affirmative. I enclose herewith a copy of opinion to Hon. J. B. Hilliard, Clerk of the Circuit Court of Pike County, Troy, Alabama, June 14, 1935, in which it was held that a witness subpoenaed in more than two cases set for the same day might claim attendances in two cases, etc. You will note that attention is called to other opinions of the Attorney General appearing in the Biennial Report of the Attorney General 1926-1928, at pages 60 and 306.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 7, 1936.

Hon. J. F. Smith,
Clerk of Circuit Court,
Escambia County,
Brewton, Alabama.

All cases appealed to the Circuit Court from the Inferior Court or County Court which were disposed of after March 26, 1936, come under H. B. 110-DeVane, Governor's No. 54, as set out in the opinion below.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 20, 1936, in which you request my opinion as follows:

"Please let me have your opinion on the following:

"House Bill 110 by Mr. DeVane passed during the Extraordinary Session, 1936 and approved by the Governor March 26th, 1936, provides that upon an appeal from a conviction in County or Inferior Courts of the several counties that no Solicitor's fees shall be taxed or collected for service of a solicitor in the Circuit Court.

"In view of the act just mentioned where cases are now pending in Circuit Court that were appealed from the County Court and there has been no final order taken should a fee for the Solicitor be taxed and collected?"

In answering your inquiry, I am calling to your attention an Act of the Legislature approved March 26, 1936, H. B. 110 by DeVane, which is as follows:

"Section 1. That Section 3759 of the Code of Alabama of 1923, be amended so as to read as follows: Section 3759. For every conviction for a misdemeanor in the County Courts or Inferior Courts there shall

be taxed and collected as a part of the costs and paid into the County Treasury the same Solicitor's fees provided for conviction in such cases in the Circuit Court, provided that in the event of an appeal to the Circuit Court no Solicitor's fees shall be taxed or collected for the services of a Solicitor in the Circuit Court."

It is my opinion this Act went into effect on its approval, which is as shown above. *Montgomery Tractor Co. v. Knabe*, 48 So. 501, *State v. Starns*, 100 Ala. 405. In my opinion all misdemeanor cases tried in the Circuit Court after March 26, 1936, which are appealed from an Inferior Court or a County Court, regardless of the time the appeal was taken, are under the provisions of this Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 7, 1936.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Power of Attorney—Probate Office should charge usual fee for recording power of attorney given by the Farm Credit Administration for the satisfaction of a mortgage to said Farm Credit Administration.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of June 29, 1936, in which you request my opinion as follows:

"Please advise whether or not the Probate Office should charge for the recording of a Power of Attorney, given by the Farm Credit Administration, for the satisfaction of a mortgage to said Farm Credit Administration."

In my opinion the Probate Office should charge the usual fee for recording a power of attorney given by the Farm Credit Administration. The Federal Agencies are exempt from paying the privilege or license tax required for recording instruments, but are not exempt from paying the recording fee. See case of *Federal Land Bank v. Crosland*, Judge of Probate, 261 U. S. p. 374.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 8, 1936.

Hon. G. L. Clanton,
Tax Collector Greene County,
Eutaw, Alabama.

Statutes—Drainage Act of 1927 (Acts 1927, p. 106 et seq.) does not authorize decree in rem against lands of petitioners for establishment of drainage district, levying assessment thereon for payment of expenses of engineers' survey and report and cost of court, where petition for

formation of drainage district is dismissed and the same is never formed or established.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion dated July 3rd, 1935, together with the file attached thereto. An examination of the file discloses that certain land-owners in Fayette, Greene, Pickens and Tuscaloosa Counties, filed a petition in the Probate Court of Tuscaloosa County, seeking the establishment and formation of a statutory corporation to be known as the Sipsey River Drain-age District, under the purported authority of Acts 1927, p. 106, et seq.; that engineers were appointed by the Court to examine into and survey the project and make report to the court; that the engineers did in fact make the survey and report, and that thereafter the petition was dismissed by the Probate Court and the proposed drainage district was never in fact estab-lished or formed.

It further appears from the file that on August 27th, 1934, the said Pro-bate Court rendered and entered a decree against the lands owned by the petitioners for formation of the said drainage district, assessing and fixing a tax and declaring a lien therefor at the rate of twenty-six cents (26c) per acre for the purpose of paying the costs of court and the expenses of the engineers' survey and report, etc. The decree provides in part:

"Said entire court costs and expenses of \$5,980.00 distributed equally among 23,000 acres makes an equal and proportionate acreage tax of twenty-six cents (26c) per acre on all of the lands of petitioners located in said drainage district, as hereinabove described and set out, and it is the further finding, order, judgment and decree of the court that said costs and expenses of \$5,980.00 are hereby made a judgment, decree and lien and are hereby taxed against all of said lands at the rate of twenty-six (26c) per acre, and that each acre hereinabove described as being situated within said proposed drainage district and as owned by peti-tioners or any of them is hereby fixed with a lien of twenty-six (26c) per acre for the collection and enforcement of this decree and the col-lection of said costs and expenses, and all of said land hereinabove listed as owned by petitioners within said proposed drainage district is hereby declared to have entered and fixed against it and there is hereby fixed and entered against it a tax of twenty-six cents per acre for the col-lection of the costs and expenses of this proceeding, including the com-pensation to the engineers for preliminary surveys and report, and said lien shall be and is of equal dignity with the lien for general state, county, city, village, school and road taxes, and there is hereby levied a tax of twenty-six cents (26c) per acre on all of the lands hereinabove de-scribed as belonging to petitioners or as being included in the petition owned by petitioners in the proposed drainage district for the purpose of paying said costs and expenses, including the compensation to the en-gineers for preliminary surveys and report, and said tax is immediately due and payable, and if not paid by December 31, 1934, the same shall become delinquent and shall be turned over to the tax collectors of the respective counties in which said lands are located for collection, and the collection of such taxes shall be proceeded with in the same manner as delinquent general state and county taxes.

"While the names of the petitioners and owners of the lands here-inabove taxed with said costs and expenses are stated above, so far as

known to the Court and to the best information of the Court, said statement of names and ownerships is merely for convenience, and said lands are taxed and the lien herein fixed according to the description of the lands rather than the statement of the ownerships, and said lands, and each acre thereof, on which the lien and judgment for said costs and expenses are fixed and levied, are hereby declared and decreed to be subject to said lien, taxes, costs and expenses, regardless of whether the ownerships are as shown above, or not, this being a proceeding in rem in which this court has fixed and taxed and levied, and does hereby fix and tax and levy against all of the lands hereinabove described as owned by petitioners in this proceeding, said lands being about twenty-three thousand acres, more or less, to the extent of twenty-six cents (26c) per acre, together with any further costs and expenses of collecting or enforcing this decree or any further decree or proceeding by this court or the tax collectors or other officials under the provisions of this decree or as provided by law."

You request my opinion as follows:

"Please advise me what steps I should take to collect the tax. You, of course, will understand all the parties have refused to pay any part of the drainage tax."

In my opinion, there are no steps which you should take to collect the alleged tax. The decree of the Probate Court assessing the same and fixing a lien on the described lands of the petitioners for formation of the drainage district, is invalid and is a nullity.

The Drainage Act of 1927 (Acts 1927, p. 106 et seq.) purports to provide for a betterment or improvement tax.—*Collins vs. Hollis*, 212 Ala. 294, 102 So. 379. Except in so far as its enactment is taken without their influence by XXI Amendment, its validity must be measured by Sections 23, 212 and 223 of the Constitution.

Section 23 provides in part "that the right of eminent domain shall not be so construed as to allow taxation or forced subscription * * * for the benefit of any individual or association."

When the Probate Court entered its decree dismissing the petition for establishment of the drainage district, there was no further public purpose involved in the proceedings. Any alleged assessment of tax against the land for the payment of costs and expenses after dismissal of the petition was for the benefit of individuals within the meaning of the quoted excerpts, supra, and is unauthorized and void.

In addition, there is serious doubt that the title of the Drainage Act of 1927 relative to assessment of costs and expenses is broad enough to encompass the provision in the body of the Act for levying a tax against the lands of the petitioners, to pay the said costs and expenses, after dismissal of the petition. The pertinent part of the title reads as follows: "To provide for the assessment and collection of costs and expenses of installing drainage systems and issuing and selling bonds therefor, and for the care and maintenance of such improvements when constructed, not in excess of the increased value of such property by reason of the special benefits derived from such improvements." See Constitution, Section 45.

The XXI Amendment does not, ipso facto, authorize counties to levy assessments for drainage improvements, nor does it have the effect of authorizing the drainage district created thereunder to make such levy.—*State vs. Gray*—

son, 220 Ala. 12, h.n. 6; and the Drainage Act of 1927, the enabling Act, makes no provision for the apportionment of the costs of the improvements and the levying of the betterment tax to pay therefor, by either of the only two agencies competent to apportion and levy the same, viz: the Legislature, or its municipal arm, the county governing body. Grayson's case, *supra*.

In speaking to the question of the effect of the constitutional limitation (now Section 212) relative to the right of the Legislature to delegate power to levy taxes, the Supreme Court in *Schultes vs. Eberly*, 82 Ala. 242, said:

"The right to **exercise** legislative power, and to **delegate** it to subordinate agencies and auxiliaries, are essentially different questions. The rule of constitutional law is, that when the constitution creates a department, on which sovereign power is conferred, the grant is exclusive, except as its delegation may be authorized by the granting instrument. The power to tax, so unlimited in capacity, so far-reaching in effect, and so liable to abuse, peculiarly falls within the operation of this rule.—*Cooley on Tax* 61. Whoever, in such case, asserts competency to delegate, assumes the onus to show constitutional authority, express or clearly implied.

"The public school system, which the constitution enjoins shall be established, organized and maintained, extends throughout the State, and is for the equal benefit of the children thereof, operating upon and in favor of all alike, without special local rights, privileges or burdens. In addition to the special funds enumerated, and a poll-tax, the power of taxation, as conferred on the General Assembly, and limited by the Constitution, was deemed a proper and sufficient mode of discharging this legislative duty.

"There being no **express** authority conferred, the power to delegate must be implied; but the implication only extends to such public corporations as are established exceptions to the general rule of incompetency to delegate. Says Justice Cooley: 'There is, nevertheless, one clearly defined exception to the rule, that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent, which is conclusive. The exception relates to the case of municipal corporations.' Such corporations, being considered parts of the machinery of the government, governmental agencies necessary and most effective to manage the local affairs of the people residing in the designated locality, by custom immemorial, a portion of the political powers of the State, has been delegated to them, to be exercised in local administration; and the authority to delegate, if not expressly incorporated in the constitution, may be regarded as clearly implied.—*Cooley on Tax*, 63.

"The conclusion, that municipal corporations, including counties, which may be classed as **involuntary quasi municipal**, are the only public corporations which the constitution recognizes as an exception to the general rule, that the legislature shall not delegate the power to tax, is strengthened by the proviso to the 24th section of the Declaration of Rights, which furnishes rules for the construction of subsequent provisions when doubtful. After modifying the declared right of eminent domain, it is provided, that it "shall not be so construed as to allow taxation or forced subscriptions for the benefit of railroads, or **any other kind of corporations other than municipal**, or for the benefit of any individual

or association." While it may be admitted there is confusion of ideas—confounding the power of taxation and the right of eminent domain—the proviso is significant to show an intention that taxation shall not be allowed, under any pretense, to corporations other than municipal.—*Waterhouse vs. Board of C. & D. of Cleveland Schools*, 8 Heisk, 857."

The Drainage Act of 1927 undertakes to delegate the power to tax to the Probate Court. The levy of such tax (by a drainage district created under a prior statute) with the approval of the Probate Court, has been held to violate Section 212 of the Constitution.—*Collins vs. Hollis*, supra. By analogy, at least, the decision in that case is controlling here. Again, if it be considered that the Drainage Act of 1927 does in fact delegate to the Counties the power to levy an assessment for drainage improvement, there is no pretense that the decree of the Probate Court of Tuscaloosa County taxing the engineers' fee and expenses and the court costs against the lands of petitioners and levying a tax thereon for the payment of the same, made such levy and assessment according to the Rule of Special Benefits applicable in such cases. Constitution Section 223.

It is therefore my opinion that the levy and assessment of twenty six cents (26c) per acre on the lands of the petitioners for formation of the drainage district, undertaken by said Probate Court decree, is a nullity and that you, as Tax Collector, have no legal right to proceed to enforce the same by collection of the alleged taxes so assessed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 9, 1936.

Hon. Walter K. McAdory, Chief,
Alabama Highway Patrol,
Montgomery, Alabama.

State Highway Patrolmen, when attending court as witnesses prior to December 5, 1935, were entitled to their per diem and mileage for such attendance, and such fees go to the individual patrolmen.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 27, 1936, in which you request my opinion as follows:

"Please furnish this Department with an opinion as to whether State Highway Patrolmen employed by the State Highway Department prior to December 5, 1935, are entitled to witness fees in cases made by them prior to December 5, 1935.

"Prior to December 5, 1935, Highway Patrolmen working under the State Highway Department were allowed to claim and retain any witness fees in cases made by them."

I call your attention to Section 1397 (8) Code of Alabama, 1928 (Mitchie) which reads as follows:

"Police, powers of commissioners.—The members of the State Highway Commission of Alabama, shall be and are hereby vested with full

police power to prefer charges against, and to make arrests of any person or persons violating any of the highway laws of the State of Alabama. The State Highway Commission shall have full authority to designate any other person or persons in the employment of the State Highway Department as a deputy police officer and such deputy police officer shall have full authority to prefer charges or, and, make arrests of any person or persons violating any of the highway laws of the State of Alabama and the jurisdiction of each officer or deputy as herein provided shall not be restricted to any one county, but shall have full authority throughout the state of Alabama. Provided, however, that said officers and deputies shall have no authority to prefer charges or make arrests for the violation of other than that of the road laws of the state of Alabama."

You will note from the above that the State Highway Commission is vested with full police powers to prefer charges against, and to make arrests of any person or persons violating any of the highway laws of the State of Alabama, and also provides that the State Highway Commission shall have full authority to designate any other person or persons in the employment of the State Highway Department as a deputy police officer and such deputy police officer shall have full authority to prefer charges or, and, make arrests of any person or persons violating any of the highway laws of the State, and that their jurisdiction extends into and over every county of the State. Therefore, in the performance of their duties as State Highway Patrolmen, they are put on a footing with and equal to the powers conferred upon sheriffs and other peace officers of the State.

As stated in a recent opinion of this office written to Hon. Chas. W. Lee, State Comptroller, under date of April 10, 1936, "that when an officer, whether he be sheriff, constable or highway patrolman, is summoned as a witness in a criminal case, and he attends as such witness, he is not performing any official act, but is performing an individual service, therefore, his attendance as such witness is not an official Act, and he would be entitled to his mileage and per diem."

See opinion of Attorney General to Hon. Howard Kirby, Clerk of the Circuit Court of Etowah County, Gadsden, Alabama, office Edition, Book 5-A, p. 144.

I call your special attention to the opinion of this office to Hon. L. G. Smith, Director, State Highway Department, of date June 1, 1932, Biennial Report of Attorney General 1930-1932, page 894.

Therefore, in accordance with a former ruling of this office, it is my opinion that State Highway Patrolmen working under the general law, *supra*, are, when attending Court in Alabama as a witness in a criminal or civil suit, entitled to their per diem and mileage for such service and that such mileage and per diem goes to the officer so attending.

Under the law as it now stands, the attendance when collected, goes to the Highway Patrol Department. This, of course, is since the approval of the Act creating the State Highway Patrol, approved December 5, 1935.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 9, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Counties—expense of audits of county officials is not such a claim against a county as to require presentation to county governing body for approval, and, therefore, is not barred under Section 228, Code of 1923, if not presented within twelve months.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 19, 1936, which is as follows:

"Upon completion of an examination in a County by an Examiner of Public Accounts, Section 749 of the 1923 Code provides that he shall then make out a claim and file with the proper authorities, etc., said claim covering the charge due the State by the County for the said County's portion thereof.

"We have a balance outstanding and due the State by a County at this time where the circumstances are as follows, i. e.

"Examiner mails a copy of the claim from another town to the county official in the county where the audit was made. The county denies having received the claim and now that several years (5 years) have elapsed, the Attorney for the county contends that the statute of limitations has run on the claim and it therefore is barred from legal payment. Will you please advise us as to the rights of the State in the premises."

The question as to whether or not the claim was presented immediately after the audit presents one of fact. However, this is immaterial as said claim, in my opinion, is not such a claim against a county as to require presentation to the county governing body for approval, and, therefore, is not barred under Section 228 of the Code of 1923, if not presented within twelve months.

"Section 749. Expense account against county; how audited and paid.—Immediately after the completion of an examination of the several county officers, which shall be made at the same time that examinations are made for the State, the examiners making such examination shall make out an account, under oath, for and in the name of the state, against said county, for approximately the number of days engaged in the county examination for such county at the same rate of pay and expense allowed for state work, and file the same with the clerk of the board of revenue, court of county commissioners or courts of like jurisdiction of said county, and also file a duplicate thereof with the state auditor, and the state auditor shall thereupon draw his warrant upon the county treasurer for said amount, and the county treasurer, immediately upon receipt of the auditor's warrant, shall pay the said amount into the state treasury out of the first county funds coming into his possession."

It will be seen from the above that such a claim is definite and certain and there is no opportunity or need for an audit by the county governing body. A summary remedy is provided for its collection. (See Section 750,

Code of 1923). As otherwise stated, it is not a claim of the class that requires the audit and approval of the county governing body, under Sections 224 and 225 of the Code of 1923, before payment can be made. **State v. Stone**, 229 Ala. 357, 157 So. 454; **Mobile County v. Barnes-Creary Supply Company**, 225 Ala. 127, 142 So. 72; **Lovelady v. Loveman, Joseph & Loeb**, 191 Ala. 96, 68 So. 48.

There being a specific provision of law authorizing and requiring the payment of the claim in question, the general statutes, requiring the presentation of claims against counties and creating a limitation period, are without application.—**Lovelady v. Loveman, Joseph & Loeb**, supra, **Dale County v. Gunter**, 46 Ala. 118. See also **Board of Revenue v. Johnson**, 200 Ala. 532, 76 So. 858.

The premises considered, it is my opinion that Section 228, Code of 1923, which provides that claims against a county must be presented within twelve months, has no application to the claim in the instant case. I know of no statute which creates a bar after five years.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 9, 1936.

Hon. Chas. J. Brockway,
County Agent,
Mobile, Alabama.

Taxation—property used as market place for truck growers not exempt.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 26, 1936, which is as follows:

"In cooperation with the Alabama Rural Resettlement Administration, the Extension Service of Mobile County contemplates erecting a farmers market shed for the convenience of the truck growers of Mobile County as a market place for their products.

"We have been offered several large fields or lots free of charge provided we can have said property exempted from taxes. Will you write me if such property would be eligible for tax exemption for this purpose which will be a non-profit business institution."

I am of the opinion that your inquiry should be answered in the negative. I know of no provision of law that would exempt property used as above set out from taxation. The use of the property in question does not, in my opinion, come within the exemption of Section 91 of the Constitution, or Section 2 of the Revenue Act of 1935, relative to the use of property for purposes purely charitable.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 9, 1936.

Hon. H. M. Brittain,
Judge of Probate, Randolph County.
Wedowee, Alabama.

1. The Judge of the County Court has no authority to hear preliminary proceedings as such judge, but his authority emanates from Sections 5218 and 5136, Code of Alabama, 1923, as a committing magistrate.

2. The Clerk of the County Court has no authority or jurisdiction in connection with preliminary proceedings before the Judge of the County Court as a committing magistrate, and the Judge of the County Court as such magistrate must issue all papers, subpoenas, etc., connected with such preliminary hearing.

3. The Clerk of the Circuit Court as ex officio clerk of the County Court is without authority or jurisdiction to issue any papers in connection with preliminary hearings heard before the Judge of the County Court as a committing magistrate under Sections 5218 and 5136, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 17, 1936, in which you request my opinion as follows:

"Please give me an opinion as to the duties and compensation of the County Judge and the Circuit Clerk in a preliminary had before the County judge acting in the capacity of a committing magistrate, based on the following questions:

(1) Does the County Judge Act in his capacity as County Judge or does he act as a Committing Magistrate with the authority only of a Justice of the Peace?

(2) If acting as a committing magistrate should all subpoenas be issued by the Circuit Clerk in his capacity as ex-officio clerk of County Clerk? If Circuit Clerk does not act as such clerk, then who is the proper authority designated by law to issue subpoenas?

"(3) If Circuit Clerk acts with authority as such clerk can he collect a pro-rata part of the \$5.00 fee allowed for his services?

"(4) If Circuit Clerk is not Clerk to the County Judge acting as a Committing Magistrate then would the proceedings be void where all papers were issued by the Circuit Clerk and defendant bound over to action of the grand jury by the County Judge?"

Answering your first inquiry, I call your attention to the fact that the Judge of the County Court, as such, has no jurisdiction of preliminary hearings. Preliminary proceedings are only had by magistrates. See Section 5218, Code of Alabama, 1923, which is as follows:

"Upon a complaint being made to any one of the magistrates specified in Section 5136 that such offense has, in the opinion of the complainant, been committed, the magistrate must examine the complainant, and such witnesses as he may propose, on oath, take their depositions in writing, and cause them to be subscribed by the person making them."

This brings us to the question of who are magistrates? In answering this, I call your attention to Section 5136, Code of Alabama, 1923, which is as follows:

"The judges of the appellate and circuit courts, and courts of like jurisdiction, throughout the state, the judges of probate, the judges of the county courts, judges of inferior courts, and justices of the peace, in their respective counties; and the mayor or chief officer of any incorporated town or city, within the limits of their respective corporations, are magistrates within the meaning of this chapter, and authorized to require persons to give security to keep the peace in the manner provided in the next article."

You will note the above Section sets out who are magistrates and among those mentioned we find the Judge of the County Court, but this simply means that when he is sitting in a preliminary hearing, he does not sit as Judge of the County Court, but simply as a committing magistrate, and this is true of all of the officers designated in said section. See O. A. G. 1922-24 page 130. A Judge of the Supreme Court may sit as a committing magistrate in a preliminary hearing, but he does not sit as Judge of the Supreme Court, but simply as a magistrate. See *State v. Humphrey* 125 Ala. 110.

Answering your second inquiry, as above stated, neither the county court, nor you as Judge of the County Court, has any jurisdiction over preliminary hearings, but due to the fact that you are Judge of the County Court, you are designated under Section 5136, supra, as a magistrate, and magistrates are only given jurisdiction over these preliminary proceedings. Therefore, the Clerk of the Circuit Court, who is made by statute Ex-officio Clerk of the County Court, has no connection with these proceedings, and you are the clerk of your own Court when sitting as committing magistrate, and you issue all subpoenas for witnesses, affidavits and warrants.

I do not think it necessary to answer your third inquiry, as by my answer above, the Clerk of the County Court is eliminated.

Answering your fourth inquiry, I do not know just what you mean in your request where you say "the papers issued by the Clerk of the Circuit Court." If you mean the complaint and warrant of arrest, my answer would be in the affirmative. See *Gressom v. Lawler* 10 Ala. App. 540—*Reach v. Quinn*, 159 Ala. 340. As the Clerk of the Circuit Court who becomes Ex-officio Clerk of the County Court is without jurisdiction or authority to issue such papers. However, if on the other hand, you issue the complaint and the warrant of arrest and the Clerk only issues subpoenas for witnesses, then, in this event, I do not think the proceedings void, as the Clerk, in the performance of these duties (though not authorized) was only acting in a ministerial capacity and if the witnesses appeared and testified and the defendant was bound over by you, then there would be nothing that could be taken advantage of in any later proceedings.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 9, 1936.

Hon. N. P. Tompkins,
Judge of Probate, Colbert County,
Tuscumbia, Alabama.

License and taxation—Record filing tax—Under facts stated deeds held not to require payment of same.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 16, 1936, in which you request my opinion as follows:

"There has been presented to me to be recorded a deed from the Alabama Water Service Company to the City of Sheffield, a municipal corporation of the State of Alabama, which expresses a consideration of \$336,415.21.

"Please kindly advise me whether a deed filing tax should be charged on this deed.

"There has also been presented for record an instrument executed by Central Hanover Bank & Trust Company, as Trustee, to Alabama Water Service Company which contains the following statements:

"KNOW ALL MEN BY THESE PRESENTS, THAT:

"WHEREAS, by an indenture dated January 1, 1927, Alabama Water Service Company, a corporation of the State of Alabama, hereinafter referred to as the Company, conveyed to Central Union Trust Company of New York as Trustee, certain water works systems and real estate situate in sundry counties in the State of Alabama, and in addition thereto, all other property, real, personal and mixed, which the Company then owned, and all property which the Company might thereafter acquire, excepting, however, all accounts receivable, bills receivable, cash on hand and in bank, materials and supplies, and all shares of stock and bonds not specifically transferred or assigned to or pledged with the Trustee under said Indenture; and

"WHEREAS, on May 15, 1929, Central Union Trust Company of New York duly merged into itself The Hanover Bank of the City of New York and simultaneously changed its name to Central Hanover Bank and Trust Company, and the corporate name of said Trustee is accordingly Central Hanover Bank and Trust Company, hereinafter called the Trustee; and

"WHEREAS, after the execution of said indenture the Trustee has been advised that the Company had acquired additional properties referred to below which the Trustee is advised are subject to the lien of said indenture, certain of said items having been formally conveyed by a Supplemental Instrument dated October 3, 1929; and

"WHEREAS, the Company has conveyed or agreed to convey to the City of Sheffield, Alabama, the properties described below, has requested the release from the lien of the said indenture of the said properties and has duly complied with all requirements imposed upon it by said indenture in order to obtain a release from the lien of said indenture of the properties described below; and

"WHEREAS, the sum of \$350,505.00 has been paid to the undersigned as Trustee under said indenture prior to or contemporaneously with the delivery hereof;

"THEREFORE, for and in consideration of the premises, and of the cash in hand paid to the undersigned, the receipt of which is hereby acknowledged, the undersigned Central Hanover Bank and Trust Com-

pany, a corporation under the laws of the State of New York, as Trustee under said indenture, does hereby release and discharge from the lien thereof;

(Long Description follows)

"All of the above and foregoing lands and property are hereby released, remised and quit-claimed unto the said Alabama Water Service Company, to be holden unto the said Alabama Water Service Company, its successors and assigns, together with all rights, tenements, hereditaments, appurtenances thereunto belonging or appertaining, free from the lien of said indenture, but without warranty or representation of any kind, express or implied on part of the undersigned.

"Please advise me whether this release or quit-claim requires a deed filing tax and if so, how much."

The deed from the Alabama Water Service Company to the City of Sheffield, a municipal corporation of the State of Alabama, being presumably filed by the grantee, the general rule laid down in *Huntsville v. Madison County*, 166 Ala. 389, and *State v. City of Montgomery*, 151 So. 857, that a political sub-division of the State is not subject to taxation in the absence of a clear legislative intent to impose such tax is here applicable. There is no clearly expressed legislative intent to impose the tax in question on a deed filed by a municipality and consequently the deed in question would not, in my opinion, be subject to deed tax.

In reply to your second inquiry I enclose opinion of this office to Judge of Probate of Geneva County, Alabama, under date of January 28, 1929 (Biennial Report Attorney General 1928-1930, page 156) in which the law with reference to the proper amount of filing tax to be charged for a quit-claim deed is ably discussed by the late Judge Evans. The instrument here under consideration appears to be merely a release given for the purpose of clearing the record, and consequently would not be subject to the deed filing tax.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 9, 1936.

Hon. Thos. W. Coleman,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Privilege tax—Under facts stated no privilege tax required for recording agreement to sell lands.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you request my opinion as follows:

"Will you please give us an opinion on the filing tax on the following:

"Mrs. A enters into an agreement with Mr. B to sell certain lands to Mr. B on the following conditions: Mrs. A agrees to sell for \$2250.00,

\$100.00 cash and \$2150.00 evidenced by promissory note. This note is paid before the agreement is recorded and in the meantime Mrs. A dies and the Administrator of her estate executes deed setting out the agreement in the deed and pays the filing tax (deed tax) on the deed of \$2250.00 stating in the deed that the \$2250.00 has been paid on the agreement and wishes also to file the agreement to perfect the title. Should he be required to pay the tax on the agreement also. We will thank you to advise us in the premises."

In my opinion there is no privilege tax due on the agreement.

I refer you to parts of Schedules 46 and 94 of the 1935 Revenue Act, which are as follows :

"Schedule 46. Deeds, bills of sale, etc. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in any such property, * * * shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: * * *"

"Section 94. No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, which conveys any real or personal property situated within this State, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to-wit:****"

At the time the agreement is offered for recording it does not convey any interest in the property so as to come within the schedules, supra.

The interest Mrs. A had in the land has been conveyed to Mr. B by the administration deed. As the privilege tax has been paid on the administration deed, and the agreement to sell is set out in the deed, it is my opinion that the agreement to sell is similar to a quitclaim deed executed for a nominal consideration given for the purpose of perfecting title to real estate and should be recorded without the payment of a privilege tax.

See Biennial Report of Attorney General, 1928-1930, p. 156.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

July 9, 1936.

License—Mortgage Tax:

Where A gives B a mortgage describing certain property and pays the mortgage tax thereon, and shortly thereafter files another paper describing the same indebtedness with the identical maturity for the purpose of correcting the description in the previous instrument, no mortgage tax is due upon such instrument.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of June 20, 1936, in which you state:

"A gives B a mortgage on certain real property showing three notes and their due date, B had the mortgage recorded and paid the required amount of mortgage tax. At a later date, B files another mortgage given by A for the same consideration, showing three notes for the same amount and the same due date as the first mortgage showed. The last mortgage states that it is given to correct the description of the property and shows the correct book and page in which the first is recorded.

"Please advise if the same rule applies to mortgages given to correct a prior mortgage as applies to deeds that are given to correct a prior deed, with reference to the filing tax."

In reply, I beg to advise that subdivision (d) of Schedule 94 provides:

"(d) The privilege taxes required by law to be paid on mortgages, deeds of trust and similar instruments shall not be required on or for the filing of any such instrument, providing additional or substantial security for any indebtedness secured by an instrument previously filed, upon the filing of which the taxes provided by law have been paid or which was filed at a time when no such privilege taxes were required by law, provided the secured indebtedness remains unchanged in amount and in time of maturity."

While the facts set out by you do not come within the exact letter of the foregoing proviso, yet, in fact, the correction amounts to a substituted or additional security and the secured indebtedness upon which the mortgage tax has been paid remains unchanged in amount and in time of maturity. It is, therefore, my opinion that no mortgage tax is due upon the second paper filed for the purpose of correcting the description in the first.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 9, 1936.

Hon. Henry S. Long,
State Land Commissioner,
State Tax Commission,
Capitol.

Attention Mr. J. T. Carlton, Clerk.

Taxation Land Agents:

Where lands which have been sold to State for taxes are sold by the State Land Commissioner and proceeds collected by him, any compensation due the State Land Agents should be paid out of such collections before the remainder is disbursed to the various agencies entitled thereto.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 25, 1936, in which you state:

"By the provisions of Act No. 440, House Bill 1048 by McDermott, approved September 13, 1935, the State Land Commissioner is authorized to contract with land agents to secure sales of property and for such services to allow a compensation not to exceed 10% of the proceeds of the sale. In making sales of tax lands the conveyances are executed by the State Land Commissioner and the funds derived from such sale are received by the Land Commissioner and certified to the Comptroller for deposit in the State Treasury, including the funds belonging to the county and county officers as well as the funds belonging to the State. These various funds are set up on the basis of a distribution furnished to the Comptroller by the State Land Commissioner and the county funds are paid over to the Judge of Probate of the county on warrant drawn by the Comptroller on the State Treasury.

"The question arises as to how the land agents appointed under the authority of the above act are to receive the compensation allowed under the provisions of said act on sales. In an opinion rendered by your office on December 3, 1935 to the Hon. W. W. Hill, Judge of Probate of Montgomery County (Quarterly Report, October 1935-December 1935, page 291), discussing fees of agents on redemptions, you held that, "The statute is silent as to how the compensation shall be paid, but it does provide that it shall be paid from the funds so received". As stated above, the funds received for land sales are distributed by the Comptroller to the county and to the various funds of the State. Should the Judge of Probate deduct the commissions due to the land agent from the funds received by him from the Comptroller before making his distribution to the various funds of the county?

"It is apparent that the commissions on the State funds would necessarily come from the Comptroller, for he is the disbursing officer for the State, but the question has arisen as to whether or not the Judge of Probate is the proper official to disburse the commissions on the county's part of the proceeds of land sales.

"It occurs to this office that the Comptroller would have no authority to make deductions from the county's funds by reason of the commissions, but is required to pay over to the Judge of Probate the full amount of the county's part of the proceeds of the land sale. We would thank you to give us your opinion as to whether our interpretation of this provision of law is correct."

In reply, I advise that in the opinion to which you referred of December 3, 1935 to the Hon. W. W. Hill, and also in opinion of February 21, 1936 to Hon. W. M. Vaughan, Probate Judge of Dallas County, Quarterly Report Vol. II, page 194, this office held that as the statute provided that the commissions of the Land Agent should be paid from the proceeds, and as the Judge of Probate collected the proceeds on redemption, presumably he was the proper party to disburse them.

However, in the case suggested by you there is a sale by the State Land Commissioner of the State's interest and the proceeds are paid to him and it is therefore my judgment that upon a parity of reasoning with the former opinions he, as the official who receives the funds, should pay the commissions before disbursement to the various agencies entitled to their pro rata part. As the Comptroller is the disbursing and distributing officer of the State, presumably he should pay these commissions upon proper certificate

from you and disburse the net proceeds to the various agencies in proportion to the amount due each.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 9, 1936.

Hon. George D. Johnston,
Tax Assessor,
Tuscaloosa County,
Tuscaloosa, Alabama.

Taxation Exemptions—

Under Subsection (j) of Section 2 of the Revenue Act of 1935 allowing an exemption of "two horses or two mules", a person may claim as exempt one horse and one mule.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of recent date in which you state:

"Subsection (j) of Section 2 of the Revenue Act of 1935, provides the following exemption, "namely, two mules or two horses", and on the 1936 tax return list, under items 11 and 12, are, "11. Horses and mares", "12. Mules", and under the next column, "Maximum Exemption", bracketed as opposite both 11 and 12, are these words, "Two (2) horses OR two (2) mules".

"There are a number of cases where taxpayers return one horse and and mule, and the question has arisen as to whether such a taxpayer is entitled to have one horse exempted and one mule exempted, or whether the exemption can apply only to horses or only to mules.

"It seems to me, as a matter of common sense, that the intention of the law is to exempt one of each kind of animal if the taxpayer has only one, but that if he has two of each, he cannot claim an exemption of four, or in any event an exemption of more than two animals of this character.

"Will you please give me, as soon as convenient to you, your opinion as to whether, (1) a taxpayer having one horse and one mule can secure exemption for both, and (2) whether where he has one horse and two mules, or one mule and two horses, he may choose and elect which two of the three animals he may desire to claim as exempt."

In reply, I advise that in my judgment the intention of the statute is to allow a total exemption of two animals and that this exemption can be claimed as to two horses or two mules or one horse and one mule. It is further my opinion that a person, as you suggest, having one mule and two horses may choose and elect which two of the three animals he might desire to claim exempt.

While the statute is not perfectly clear, this seems the reasonable construction to be given it. The Legislature has clearly allowed exemption of two animals which may be either two horses or two mules. It would seem to be an artificial and strained construction to hold that in order for a per-

son to secure the exemption of two animals both must be either horses or mules. As stated, it is, therefore, my opinion that the exemption refers to the number, primarily, rather than to the description, and that a person may exempt either two horses or two mules or one horse and one mule.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 9, 1936.

Hon. W. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Under Section 291 of the General Revenue Law of 1935 as amended by the Act approved Mar. 26, 1936, taxes accruing on the property subsequent to the redemption, should be paid to the Tax Collector.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of June 16, 1936, in which you state:

"In extraordinary Session of 1936, Section 291 of Revenue Law, approved July 10th, 1935, was amended to read:

"... Probate Judge of the County where the real estate is situated, the same to be approved by the State Land Commissioner, and shall deposit with the Probate Judge a sum equal to not less than one-fourth of accrued taxes, without interest or penalties, and annually thereafter shall pay not less than one-fourth of said sum to the Probate Judge. The party redeeming said property shall, within thirty days from the date of making said initial payment, assess said property for taxes for the then current tax year, and the same shall be assessed for each year thereafter in the manner required by law, and the taxes for the subsequent tax years shall be paid in the manner required by law. Upon the payment of all back taxes, as provided for herein, and of all taxes for the subsequent tax years, which has accrued, a certificate of redemption shall be issued as in other cases. This Act is to take effect upon its approval by the Governor.

"Approved March 27, 1936.'

"Is current year tax under this amendment payable in regular way to Tax Collector of County, if so, should Probate Judge demand that tax receipt for current year taxes, be in evidence, before accepting quarterly payment, or should receipt for quarterly payment be Collector's authority to accept payment of current year's tax, or should Probate Judge collect current year's tax together with the quarterly payment on accrued tax?"

In my judgment, under the amended section, the statute clearly intends that taxes based on assessments made subsequent to redemption, shall be paid to the Tax Collector. I so construe the term, "in the mannner required by law". It would appear that if the annual redemption payment is payable subsequent to the due date of the annual taxes paid to the collector, that the redemptioner should make some showing to you, either by tax re-

ceipt or other satisfactory evidence that the annual taxes accrued subsequent to the redemption have been paid.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 9, 1936.

Hon. G. C. Brittain,
Secretary of Board of Revenue,
Calhoun County,
Anniston, Alabama.

County Officials' Bonds—Act No. 191—Bains, approved April 20, 1933, Acts 1933, p. 203, with reference to official bonds of county officials repeals the Local Act 1927, p. 345, relating to Calhoun County and such County is governed by the provisions of the General Act of 1933.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of April 23, 1936, requesting my opinion as follows:

"The Board of Revenue of Calhoun County, Alabama, desires your opinion upon the following:

"Under Local Acts of the Legislature of Alabama, 1927, page 345, the chairman of the Board of Revenue furnished bond in the sum of \$5000.00 and each associate member furnished bond in the sum of \$2500.00 and each paid the premium for his bond.

"When the Legislature of Alabama in extra session in 1933 passed the act appearing on page 203 of this Extra Session of 1933, the Board of Revenue of Calhoun County considered they were governed by this act and especially by Section 13 thereof and have since that time executed bonds as provided by said section, and the premiums have been paid by the county as provided by Section 20 of this Act.

"Please advise the Board of Revenue whether or not they are governed as to the making of their official bond and the payment of the premium thereon by the local act above referred to or by the general act above referred to.

"Attached hereto is copy of opinion rendered to the Board of Revenue by local attorneys for said Board of Revenue."

It is my judgment that the General Act appearing in Acts of 1933, page 203, is a repealer of your Local Act so far as the same may be in conflict. It appears that the General Act is intended to create a uniform system of uniform regulations for the entire State and all of the Counties.

In the first section it refers to "all county officials" and "of all counties in the State". Beginning Section 13, specific reference is made to "each county". Section 26 specifically repeals all laws or parts of laws in conflict with this Act. While, as a general rule, a general law does not repeal a local law, yet where there is a clear legislative intent it has that effect. In my judgment this General Act was intended to create a uniform system and it

was the intention of the Legislature to repeal any conflicting laws, whether local or general.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 10, 1936.

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol .

Taxation—Income Tax, Deductions.

"Estate Tax" levied by Article 12, Chapter 2 of the 1935 Revenue Act is an allowable deduction from income tax.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of recent date, stating:

"An opinion is requested as to whether or not estate and inheritance tax imposed by Article 12, Chapter 2, House Bill 324, approved July 10, 1935, constitutes a proper deduction in computing net income under the Alabama Income Tax Law when paid, first, by the estate, and second, by the beneficiary of an estate.

"Section 345.11 of the Alabama Income Tax Law reads:

"In computing net income there should be allowed as deductions taxes paid or accrued within the taxable year as imposed:

"(1) by authority of the United States;

"(2) by the authority of any of the possessions of the United States;

"(3) by the authority of any states or territory, except income tax, including the State of Alabama, or of any county, school district, municipality or other taxing sub-division of the State of Alabama, except the income tax herein levied; Provided, however, that the amount of Federal income tax apportioned to Alabama may be determined by the ratio that the amount of net income on business done within Alabama bears to the amount of net income from business within and without the State of Alabama."

"Under Section 23 (c) of the Federal Income Tax Revenue Act of 1934 estate, inheritance, legacy, succession or gift taxes are not deductible.

"Under the Income Tax Law of the State of New York, Article 144 of the regulation, it is held that the inheritance taxes do not constitute an allowable deduction from income but that the federal estate tax is an allowable deduction to an estate taxable as an entity during the period of administration and settlement.

"In view of the fact that we have a case pending involving considerable amount and the question will naturally have to be handled during the correct filing period from now until March 15th, an opinion at an early date will be appreciated."

It appears from the specific provisions of the Statute that such tax constitutes a deductible item. While I realize that estate and inheritance taxes have many features of capital levies and were so described by the late Calvin Coolidge, when seeking their repeal, yet the Courts have generally held them to be privilege taxes on the right to bequeath, transmit or inherit.

The Estate Tax levied by Article 12, Chapter 2 of the 1935 Revenue Act, is based upon, follows and is controlled by the Federal Act. In fact the constitutional amendment authorized the levy only and to the extent the Federal Act authorized the States to levy a tax to be credited against the amount otherwise due under the Federal Act. That the Estate Tax is a tax levied by authority of the Federal Government and as to that part paid to the State it is a tax levied by authority of the State of Alabama, there can be no doubt.

Section 345.11 allows credit for all taxes levied by the United States and all taxes levied by the State "except Income Tax". It is accordingly an allowable deduction.

I note the manner of your inquiry whether deductible "when paid first by the estate, and second by the beneficiary". I do not assume that thereby you infer that a double or duplicate deduction is sought, but, if so, nothing in this opinion is intended to so authorize.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 10, 1936.

Hon. Watkins M. Vaughn,
Judge of Probate, Dallas County,
Selma, Alabama.

County funds may not be used to retain railroad facilities of county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I am in receipt of your letter of February 21, 1936 requesting my opinion as follows:

"I desire your opinion on the following statement of facts: The Southern Railway Co. has a bridge at Jackson, Alabama, in Clarke County. The Secretary of War, in Washington, made an order requiring the Company to build a new bridge at considerable cost, which the Company did not think was justifiable, considering the business of that division of the Company. The Company thereupon made application to abandon the bridge and a part of its track leading to it. Whereupon, numerous communities served by the Railroad became very much interested and concerned, as it was very much to the interests of all of them that the road should run through to Mobile.

"Committees from the various organizations sent representatives to Washington and to Jackson in connection with the matter, and it is desired now that the various counties make appropriations to cover these expenses, based on the theory that the continuance of the through road would be an aid to agricultural interests of the various communities.

"I would thank you to advise me as to whether in your opinion an appropriation out of the County funds would be legal in the premises."

I am of the opinion that an appropriation from county funds for the purpose of retaining railroad service would not be legal. While subsection 23 of Section 6755 of the Code of 1923 provides that the Board may make appropriations in reference to the resources of the County, I believe that it would not be possible to bring the expenditure contemplated within its provisions.

This office has held that a Court of County Commissioners has no authority to pay expenses for securing the location of a United States Veterans Hospital in the County, 1928-1930 Biennial Report of Attorney General, 809. I am of the opinion that the same reasoning applies in the instant case and that the expenditure which you suggest would not be permitted.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 11, 1936.

Judge Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Judge of Probate required to give special bond as ex officio Chairman of Board of Revenue under Section 13 of the Bains Act (General Acts, 1933, Extra Session, p. 203).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 29, 1936, in which you request my opinion as follows:

"I am under a \$25,000.00 bond as Judge of Probate. Please advise me if I should be under a special bond as ex officio Chairman of the Board of Revenue.

"The Board of Revenue of this County operates under a local law found in the Local Acts of 1935 at page 253."

In my opinion your inquiry should be answered in the affirmative.

I call your attention to the Bains Act of 1933 (General Acts, 1933, Extra Session, p. 203) providing for and requiring bonds of county officials. Section 13 of this Act provides as follows:

"Section 13. That each member of the Court of County Commissioners, of the Board of Revenue or like governing body of each county shall be required to give a bond in the sum of at least \$3,000.00 to be fixed and approved by the Judge of the Circuit Court of a Circuit of which such county forms a part and where there are two or more Circuit Judges in said Circuit, then said bonds shall be fixed and approved by the Senior Judge of said Circuit."

By Section 6748, Code of Alabama, 1923, the Judge of Probate is made as much a member of the commissioner's court or other county governing body as are the other four members composing said body.

Accordingly the Probate Judge must comply with Section 13 of the Bains Act, *supra*, and give bond in the sum of at least \$3,000.00, etc., as well as the official bond prescribed for the Judge of Probate by Section 4 of said Act. Cf. Biennial of Attorney General, 1932-1934, page 62.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 11, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Section 7285, Code of 1923 construed—Term “net annual compensation” held to mean difference between total amount earned for the use of the officer, and operating expenses.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 16, 1936, in which you request my opinion as follows:

“Section 7285 of the Code reads as follows, to-wit: ‘Discharging his duties in relation to public roads, on proof to the County Commissioners that he has discharged such duties, annually, to be paid out of the County Treasury, not exceeding \$400.00.

“‘But this shall not apply to any Probate Judge who receives **net annual compensation** from his office exceeding five thousand dollars.’

“Does **net annual compensation** mean the net amount collected or the net amount earned?”

In my opinion the phrase “net annual compensation” connotes the difference between the gross or total amount received by the officer for his own use and the operating expenses. Cf. *Pa. Canal Co. v. Brown*, 235 F. 669, 679, (C.C.A. Pa.).

Breaking the phrase down we find that the use of the word “net” indicates that something has been deducted. The term suggests a balance after all deductions have been made from a larger sum. 45 C. J. 1384, n. 20.

“Annual”, of course, means simply “yearly; every 12 months.” 3 C. J. 195, n. 41; while “compensation” signifies the remuneration or wages given to an employee or officer, 12 C. J. 231, n. 46.

Thus we see that the term “net annual compensation” has reference to the “yearly remuneration” earned by the officer after the operating expenses have been deducted.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 11, 1936.

Hon. Frank M. Stewart, Secretary,
Milk Control Board,
Montgomery, Alabama.

Milk producer liable for license on entire herd even though milk from part of herd is sold to processor.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of September 16, 1935, stating:

"The Hamner Milk Control Act, approved July 9, 1935, in Section No. 4, provides that the Attorney General shall be legal advisor to the State Milk Control Board. As Executive Secretary of the Alabama State Milk Control Board, your opinion is requested on the following matter:

"The Board is in receipt of an application for a Producer-Distributor license from J. F. Duggar and Company of Hope Hull, Alabama. Mr. Duggar shows on his application that he has 100 cows in his herd, dry and milking over two years of age at the date said application is signed. Mr. Duggar states as follows: 'I am herewith handing to you my application blank for a license to sell milk in Birmingham, where I sell milk from approximately thirty-five of my cows. The proportion of dry cows accompanying this thirty-five cows is five. This makes a total of forty cows under the law, for which I am inclosing a check.'

"Under Section 11, Producers are required to pay an amount equal to Fifty cents per cow, dry or milking over two years old. Provided that each person, firm or corporation shall be exempt from the payment of said license tax on five cows or less. For the purpose of determining the total amount of such producers fee the Board shall calculate same upon the largest number of cows in each producers herd or herds at any time during the license year and in the event any producer acquires or uses additional cows during the license year he shall pay an additional fee of fifty cents for each additional cow.

"It is our belief that Mr. Duggar's contention of only paying for 40 cows is based on a provision in Section 18, as follows:

"'Provided that nothing in this Act shall be construed to apply to a producer supplying milk only to Processors who buy milk solely for processing purposes, who do not re-sell or dispose of same as raw or pasteurized fluid milk.'

"The J. F. Duggar and Company at present are selling to two milk plants, one the Southern Dairies Plant, here in Montgomery, which is solely a processor and they do not come under the jurisdiction of the State Milk Control Board. The other plant is the Homewood Dairy, located in Birmingham. This plant does come under the jurisdiction of the State Milk Control Board. The question is this: Under the Act should the Board require J. F. Duggar and Company to pay license on 100 head of cattle as shown in his application or only on the 40 head.

"Kindly give us your opinion on this matter as soon as possible as the Board would like to know just what action to take in regard to this application."

The Hamner Milk Control Act provides in Section 11, after prescribing the fee of 50c per cow to be paid by producers, as follows:

"For the purpose of determining the total amount of such producers fee the Board shall calculate same upon the largest number of cows in each producers herd or herds at any time during the license year and in the event any producer acquires or uses additional cows during the license year he shall pay an additional fee of Fifty Cents (\$.50) for each additional cow."

The word "herd" is defined as "a number of beasts assembled together". 29 C. J. 347. Also see Webster's Dictionary.

As the cows in question are apparently all together, and as they number 100, I am of the opinion that the license fee should be paid on that basis. To require license to be paid on only 40 cows of the 100 would be to require payment on only **part** of a herd, whereas Section 11 specifically provides that the tax shall be paid on "the largest number of cows in each producer's **herd**".

I am further led to this conclusion by the provision in said Section 11 that if the herd is increased, the producer shall pay on all cows which he "**acquires or uses**". It seems to be the intention of the Legislature to place the tax on all cows in the herd regardless of whether they are used or whether they are merely part of the herd.

I am therefore of the opinion that the herd should be taxed on the basis of a herd of 100, in accordance with the facts above set forth.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 13, 1936.

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Income from securities held by resident trustee for non-resident beneficiary is subject to income tax.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of March 6, 1936 in which you state:

"An opinion is requested as to whether income from intangibles, such as stocks, bonds, etc. of a non-resident trust held by a trust department of an Alabama banking institution constitutes taxable income to the non-resident trust or a non-resident beneficiary under the Alabama Income Tax Law.

"This office has a letter from the trust officer, Mr. H. A. Pharr, of the First National Bank, Mobile, in regard to this matter, which reads as follows:

"We recently received a letter from Mr. Billings advising that securities that would be subject to the ad valorem tax, when held in trust belonging to a non-resident would not be subject to this tax.

"It occurred to us that, for the same reason, income from a trust held for a non-resident would not be subject to our state income tax.

"Will you please give us your opinion on this at your earliest convenience, and oblige."

In reply, I call your attention to the following provision of the Statute:

"Section 345.1 Income Tax. In addition to all other taxes now imposed by law there is hereby levied and imposed a tax on the entire net income as defined in this Article, which tax shall be assessed, collected and paid annually at the rate specified herein, upon the net taxable income for each calendar year as hereinafter provided.

"(a) Persons and subjects taxable under this article are:

"(4) Every resident individual or corporation acting in a fiduciary capacity;

"(5) Every estate and trust resident in the State of Alabama;

"(6) Every non-resident individual receiving taxable income from property owned or business transacted in Alabama."

"Section 345.10 Gross Income Defined. (Individual) The term 'gross income' as used herein:

"(1) Includes gains, profits and income derived from salaries, wages and/or compensation for personal services of whatever kind, or in whatever form paid, including the salaries, income, fees and/or other compensation of State, county and municipal officers and employees, or from professions, vocations, trades, business, commerce or sales, or dealings in property whether real or personal, growing out of ownership or use of or interest in such property; also from interest, royalties, rents, dividends, securities or transactions of any business carried on for gain or profit and the income derived from any source whatever, including any income not exempted under this Article and against which income there is no provision for a tax."

"(3) The term 'gross income' shall mean and include all of such income arising from sources within and without the State whether paid to residents or non-residents, including interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise, and all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits in the manufacture and disposition of goods within or without the State of Alabama.

"It shall also mean and include interest, dividends except stock dividends as defined herein, or other forms of income from and gains or profits realized upon the sale, exchange or other disposition of all forms of intangible personal property owned by or held anywhere in or without the State of Alabama for the account of any resident or domestic corporation."

It will be seen from the foregoing sections that the Statute makes such income taxable.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 15, 1936.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Act No. 105 H. B. 178, approved April 10, 1936, amending Schedule 158 of Revenue Bill by adding Schedule 158.16½ held unconstitutional as violative of Section 45 of the Constitution.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 25, 1936, in which you request my opinion as follows:

"I respectfully request your opinion as to whether or not Schedule 158.16½ of the Revenue Code of 1935, as amended by said schedule, is valid; and if the Probate Judges are authorized to make transfers of automobile license tags under said amended section. Your early reply will be deeply appreciated."

In my opinion, the Act in question fails to meet the constitutional requirements of Section 45, in that it amends in the body of the Act the Act of July 10, 1935, without further reference thereto by simply adding a new section. This practice is condemned by that part of Section 45 which reads as follows:

"No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

I quote from **Ferguson v. Court of County Commissioners of Jackson County**, 187 Ala. 645, 65 So. 1028, which cites with approval the rule first announced in **Tuscaloosa Bridge Co. v. Olmstead**, 41 Ala. 9:

"It is noted that the act of August 26, 1909, amends the said original act of March 12, 1907, by adding a section thereto numbered 16. No part of said original act is set out; the amendment being attempted solely by the incorporation in the act of an additional section.* *"

"The court says (**Tuscaloosa Bridge Co. v. Olmstead**):

"The language of the constitutional provision is as follows: 'No law, nor any section of any law, shall be revised or amended by reference only to its title and number, but the law or section revised or amended shall itself be set forth at full length.'

"In the cases of **Ex parte Pollard** and **Ex parte Woods**, 40 Ala. 77, we used the following language, in reference to the meaning and effect of this clause: 'It was never intended by the Constitution that every law which would affect some previous statute of variant provisions on the same subject should set out the statute or statutes so affected at full length. If this were so, it would be impossible to legislate. The constitutional provision relates to those cases, where the act is strictly amendatory or revisory in its character. Its prohibition is directed against the practice of amending or revising laws by additions, or other alterations, which, without the presence of the original, are usually un-

intelligible. If a law is in itself complete, and original in form it does not fall within the meaning and spirit of the Constitution.'

'The Act under consideration most clearly comes within the scope of the clause of the Constitution thus construed. **It is in form not original, but amendatory.** It is placed in the legal attitude of being incorporated in additional sections in the original act; and its full effect cannot be determined without reference to the original act; for the entire operation of one or more provisions of an act cannot be safely pronounced without an examination of the others, with which, as parts of a whole, they are to be compared and construed. The act here is not in parallelism with those which, aiming at original legislation, affect some older law upon the same subject, merely because it happens to contain some different provision. The act in question is declared by the Legislature to be an amendment. It is named and baptized by its authors an amendment. It falls actually, and by profession, in substance and in form, within the constitutional provision. A judicial exclusion of such an act from the prohibition of the Constitution would practically disregard its mandate. While it remains, it is our duty to enforce it, whether wise or unwise, convenient, or inconvenient.'

'It is pointed out in that case as the reasons for the constitutional provision not only that the Legislature may not be misled, or be mistaken, as to the enactment, but also that the Governor may be fully informed by the act what it is that he is called upon to approve or to veto, and that others may also be assisted as against any misapprehension.

'It is further said in the opinion in the Olmstead case, supra, 41 Ala. 21, that:

'To have the law amended and the amending law presented in juxtaposition facilitates the comprehension, and consults the convenience of all who examine the law after its enactment, as well as of the Legislature, which examines on its passage.'

'It is further said in the opinion (41 Ala. 19):

'We have given careful attention to the argument that the clause of the Constitution under consideration is a mere rule of legislative proceeding and does not render void a law not conformable to it. An anxious desire to allow effect to the will of the Legislature and to avoid a seemingly harsh visitation of a rule, the usefulness of which is hardly proportionate to its inconvenience, induced us to prolong our advisement on the case, with the hope of discovering reason or authority which would lead us to the support of that argument. But it still seems to us that the clause raises a question of legislative power, and is not a mere rule for the government of the General Assembly in its proceedings. The prohibition is emphatic that no law shall be revised or amended, except in the mode specified. This is a command not specially or professedly addressed to the Legislature alone. It is as general and comprehensive as any prohibition in the Constitution. It is binding upon the executive, who approves or disapproves bills, and upon the judiciary, who declare the law, as well as upon the Legislature.'**'

'That the act of August 26, 1909, comes clearly within its influence there can be no doubt. It amends in the body of the act the act of March 12, 1907, without further reference thereto, by simply adding a

new section. The act therefore comes under the prohibition of that portion of section 45 of the Constitution above quoted, and must for this reason fall."

I have quoted at length from the foregoing case for the reason that it appears to be directly in point and the language there used is quite definitely applicable here. Neither the Tuscaloosa Company case nor the Ferguson case has been overruled or modified by any subsequent decision so far as research discloses.

It is, therefore, my conclusion that the Act in question is unconstitutional and void.

The answer to your first inquiry dispenses with the necessity of answering your question regarding the proper authority to make transfer of these automobile license tags.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 15, 1936.

Mrs. Daisy Donovan,
Child Labor Inspector,
Department of Labor,
Capitol.

Child Labor—Section 3495 Code of 1923, held not to prevent issuance of employment certificate to minor under sixteen years of age, when employed by a drug store and permitted to sell lunches on property of mechanical establishment.

Opinion by Assistant Attorney General Small.

Dear Madam:

You request my opinion as follows:

"Will you kindly advise this Department if it would be lawful to cause to be issued to a child, under sixteen years of age, a Special Employment Certificate, where such child is employed by a drug store, and the principal duty of such child is to go into a neighboring cotton mill with lunches, prepared by the drug store, for which he is working, for the purpose of selling to employees of the mill. In performing such duty it is necessary for him to go all through the mill, giving all of the employees of the mill an opportunity to buy lunches from him.

"Section 3495 of the Code of Alabama of 1923, provides as follows:

"Section 3495. EMPLOYMENT OF CHILD UNDER SIXTEEN YEARS OF AGE; HOURS OF WORK.—No child under sixteen years of age shall be employed, permitted or suffered to work in any gainful occupation, except agriculture or domestic service, for more than six days in any one week, or more than forty-eight hours in any one week, or more than eight hours in any one day, or before the hour of six o'clock in the morning, or after the hour of seven o'clock in the evening. The presence of any child under sixteen years of age in any mill, factory, or workshop, laundry, or mechanical establishment, shall be prima facie evidence of its employment therein."

"Kindly advise us, in view of the above Code Section, if such child would be permitted to go into a cotton mill in the performance of his duties while delivering lunches, and employed solely by a neighboring drug store."

In reply, I wish to advise that in my opinion your question should be answered in the affirmative.

Section 3495 of the Code of 1923 which you quote in your request in my judgment was not intended to prevent a minor under sixteen years of age from entering the premises of a mechanical establishment for any purposes whatsoever. It is my opinion that this Code Section does not prevent the issuance of the certificate named by you, if all other provisions of law governing such issuance are met.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 17, 1936.

Hon. U. B. Sullivan,
Tax Collector,
Pickens County,
Carrollton, Alabama.

Tax Assessors and Collectors are not entitled to payment for expenses incident to the services required of them respectively by Sections 30 and 157 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago, which follows:

"Please give me an opinion on the following matter.

"Under Sections 30 and 157 of the 1935 Revenue Code the Tax Assessors and Tax Collectors are required to visit each precinct of the County, and to advertise these visits unless relieved of such duty by proper resolution of the Court of County Commissioners.

"Please advise me your opinion regarding the payment of the expenses incident to said advertisements and visits, that is if the Tax Assessors and Tax Collectors are required under the law to pay their own expenses, or would this be a proper claim against the County?"

Tax Assessors and Collectors have never been entitled to payment for expenses incident to the services required of them. Their compensation comes from fees and commissions specifically authorized by law, subject to the limitations contained in the 1935 Revenue Act in regard to the maximum compensation to which they are entitled.

Section 7255 of the Code of Alabama 1923 reads as follows:

"No fee charged unless expressly authorized.—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

Therefore, a Tax Assessor or Collector claiming a fee or commission must point to specific authority of law before he is entitled to receive the same.

Since there is no law providing any fee, commission or expense to Tax Assessors or Collectors for performing the services required of them respectively by Sections 30 and 157 of the 1935 Revenue Act, they are not entitled to any fee, commission or expense for performing such services.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 17, 1936.

Hon. J. T. Albritton,
County Superintendent of Education,
Geneva County,
Geneva, Alabama.

Schools—taxes illegally collected and paid into school funds in 1931 may now be refunded, if there be a surplus in any fiscal year, over and above the necessary current operating expenses of that fiscal year, out of which same can be paid.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 9, 1936, together with copies of claims of three National Banks presented to the County Board of Education, relative to refunding taxes illegally collected by the Tax Collector and paid to the County Treasurer of School Funds. From the foregoing the following facts appear which are applicable alike to each of the three claimant banks:

Claimant was assessed by the proper authorities of Geneva County and the State of Alabama for taxes upon the shares of stock of claimant for the tax year beginning October 1, 1929 and ending September 30, 1930. Upon such assessment the Tax Collector of Geneva County made claim upon claimant for the payment of such taxes. The claimant contended that such assessment was illegal and void. The Tax Collector of Geneva County notified claimant that if such taxes were not paid on or before May 4, 1931, that he would levy upon property of claimant and sell its property for the payment of said taxes. Claimant paid such taxes on May 7, 1931 under due legal protest and on the same date and before the Tax Collector had disbursed such funds, the claimant instituted suit against the Tax Collector of Geneva County at that time, namely, F. J. Ward, for the recovery of such taxes. After such suit was instituted the said F. J. Ward, as Tax Collector, paid over to the County School Treasurer of Geneva County the portion of such taxes that would have been due for county school purposes if such taxes were legally collected. At the same time the said Tax Collector paid to the County School Treasurer the interest on such taxes. On July 8, 1932 the claimant recovered a judgment in the Circuit Court of Geneva County against F. J. Ward, as Tax Collector of Geneva County, the taxes illegally collected by said Tax Collector, with interest. The amount of such judgment included principal and interest, which was the total paid to the county Treasurer of school funds by the Tax Collector, as Geneva County Board of Education's part in the taxes illegally collected from claimant.

In view of the above you request my opinion as follows:

"Due to the fact that moneys in question have been spent by the County Board of Education, should same be refunded to the three claimant banks respectively either directly to them or to the Tax Collector?"

I am of the opinion that the moneys in question should be refunded by paying same into court if there is any surplus, over and above the current operating expenses of any fiscal year, out of which payment can be made.

The moneys in question were illegally collected and paid over to the County Treasurer of School Funds. In such an event same may be recovered back under statute. (Section 3144, Code of 1923)—**Wall-Hay-Wall Lumber Company v. Mathews**, 100 So. 824. But in the instant case the claimant banks have obtained judgments against the Tax Collector. The judgments are against the Tax Collector and not against the County Board of Education. The County Board of Education, in my opinion, has no authority to pay the moneys over to the claimant banks. On the other hand, a direct payment to the Tax Collector would not necessarily insure a payment to the claimant banks from the Tax Collector. In my opinion, the proper procedure would be to pay the moneys into court. In this event the judgments of the claimant banks may be satisfied out of said moneys; or if otherwise satisfied, the Tax Collector would be entitled to same.

What has been said in the preceding paragraph is contingent on whether or not there be a sufficient surplus, over and above the current operating expenses, out of which payment can be made. The moneys in question were received by the County Board of Education in 1931 and have been spent. The claims in question are merely indebtedness of the County Board of Education of a past fiscal year. Current expenditures of a fiscal year must first be met before past indebtedness may be paid. After all necessary current expenses of a fiscal year have been met, any surplus may be used to pay past due indebtedness.—**Hall v. Blan**, 227 Ala. 64, 148 So. 601; Opinions of Attorney General 1932-1934, pp. 285 and 294.

The premises considered, it is my opinion that moneys in question should be paid into court, provided there is a surplus in any fiscal year over and above the operating expenses of that fiscal year, out of which same can be paid.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 18, 1936.

Hon. J. E. McAdory,
Deputy Tax Assessor,
Court House,
Bessemer, Alabama.

Taxation—Party possessing Letters of Guardianship in accordance with Acts of Legislature of 1931, p. 280, held not per se entitled to exemption granted to insane persons by Section 2 (f) of the Revenue Bill of 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 14, 1936, in which you request my opinion as follows:

"I wish an official opinion as to when a man is exempt from ad valorem taxes upon the claim of incompetency as issued by the Probate Judge.

"A copy of letters of guardianship, as an example, follows:

"That on application of _____ as provided by the Uniform Veterans Guardianship Act, I have caused these letters of guardianship to issue in favor of the said _____ in accordance with the Acts of the Legislature of Alabama of 1931, page 280, and with the authority therein provided, upon the estate of _____, incompetent.

"Witness, _____ Judge of our said Court, this _____ day of _____, A. D. One Thousand Nine Hundred and _____.

Judge of Probate."

I call your attention to an opinion of this office to the Hon. Elmer L. Vinson, Tax Collector, Limestone County, under date of April 18, 1936, in which it was held that while it was not necessary for a party claiming exemption from ad valorem taxes granted by Section 2 (f) of the Revenue Bill of 1935 to be legally declared insane, nevertheless, the fact of insanity must be established by "satisfactory proof to the proper officer."

In my opinion, the issuance of the Letters of Guardianship set out by you would not per se be such proof of insanity as would entitle the party to exemption. The said Letters of Guardianship pronounces the recipient "incompetent".

Section 2 (f) demands that the persons claiming the exemption therein provided be "insane". While it is true that all insane persons are incompetent, nevertheless the converse is not a fact.

Your attention is directed to the following cases setting forth the rule that the term "mentally incompetent" denotes anyone, who, **though not insane**, is, by reason of old age, disease, weakness of mind, or from any other cause unable unassisted, to properly manage or take care of his property or himself.

Sabine v. Commonwealth, 26 S. W. (2d) 506, 509 (KY) In re Keiser, 204 N. W. 394, 396 (Neb.) State v. Dist. Court, 147 P. 612, 614 (Mont.) Shelby v. Farve, 126 Pac. 764, 765 (Okla.)

We note a further distinction between the terms "insane" and "mentally incompetent" by reference to the two instances in the Code of Alabama where "insane" is defined.

In the chapter relating to guardian and a ward a "person of unsound mind" is defined as including "idiots, lunatics, or the **insane**". (Sec. 8119). No mention is made of the "mentally incompetent". Again, in Section 1439, we find a definition of the insanity which renders a person eligible as a patient in a State insane hospital, as follows:

"1439. Insanity defined which renders person eligible as patient.— A person shall be adjudged insane who has been found by a proper court sufficiently deficient or defective mentally to require that, for his own or others' welfare (or she) be removed to the insane hospital for re-

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straint, care and treatment. Whether the person's mental abnormality is sufficiently grave to warrant such procedure is always the question to be decided by the court."

Whether the person pronounced **incompetent** was in fact insane is, as said supra, a matter within the sound discretion of the tax officials, upon satisfactory proof being offered.

Premises considered, it is my opinion that the Letters of Guardianship, while evidence of insanity, would not, of itself, be sufficient to entitle the party possessing same to the exemption granted by Section 2 (f) of the Revenue Bill of 1935. Cf. Biennial Report 1932-1934, page 578.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

See also Code # 3095 & 3045
Vol V 2, R 19, 121

July 18, 1936.

Hon. Gowan Roberts,
Tax Collector,
Talladega County,
Talladega, Alabama.

also See 223 Rev. 1935

Section 201 of the Revenue Bill of 1935—No authority to place City tax on same receipt with State and County tax nor to sell property for City tax together with State and County tax.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 30, 1936, in which you request my opinion as follows:

"Regarding the collection of City tax as provided in section 201 of the revenue code of 1935.

"When ordinance has been duly adopted placing the assessing and collection of City tax in the County offices, can this said City tax, (1) be placed on the receipt with State and County tax, and (2) in case the State, County, and City tax becomes delinquent can the said property be sold for State, County, and City tax or must said City tax be on separate receipt and separate sale held for same."

In my opinion, both of your inquiries should be answered in the negative. I call your attention to an opinion of this office rendered on September 8, 1932, to the Hon. J. D. Starkey, Tax Collector, Jackson County, Scottsboro, Ala. (Biennial Report 1930-32, page 105) wherein we find the following:

"There is no provision in the statutes for selling real estate for payment of all three of such taxes (State, County and municipal taxes) at the same time and under the same decree of the Probate Court. The proceeding for selling real estate for State and County taxes is one, while the proceeding for selling real estate for City taxes is another, though like in form."

I advise you that the foregoing statement is applicable to the collection of City taxes as well. A method is provided for the manner in which municipal taxes must be collected. There is no provision in the statutes which

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might authorize the placing on the receipt with the State and County tax the City or municipal tax.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 18, 1936.

Hon. W. L. Pratt,
Judge of Probate,
Bibb County,
Centerville, Alabama.

License—A party who buys and pays cash for eggs and chickens in Bibb County and does not dispose of his purchases there is not due any State or County license in Bibb County.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago, which is as follows:

"Is there any kind of license due from a party who buys and pays cash for eggs and chickens in Bibb County, but does not dispose of his purchases in the County."

There is no license levied on the privilege of buying eggs and chickens. Therefore, a party who buys and pays cash for eggs and chickens in Bibb County but does not dispose of his purchases in the County, is not due any license in Bibb County. See Opinion of this office to Hon. R. H. Williams, Judge of Probate, Marshall County, Guntersville, Alabama, a copy of which is enclosed for your convenience.

Of course, if this person engages in the business of selling these eggs and chickens so bought in Bibb County in some other County, either by selling the same direct to the consumer or to retailers for resale, then he would be liable for the appropriate license for either a peddler or transient dealer, as the case might be, the said licenses being levied by Schedules 146 and 147 respectively. Such a person so selling eggs and chickens which he had bought from other parties would not be entitled to the exemption contained in Schedules 146 and 147 for persons who dispose of poultry products raised by them or the members of their immediate household.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 18, 1936.

Hon. Henry S. Long, President,
State Tax Commission,
Capitol.

Attention Mr. Harry Simon, Chief Clerk, License Department.

License—Coal Dealers:

Under Schedule 36.1 the Probate Judge is not entitled to a fee of 50c for issuing the registration tag required thereunder. Under Schedule 36.2 the license being measured by the number of trucks used, the license

issued, while placed on the truck, is the business license required and the Probate Judge is authorized to collect a 50c fee for the issuance of each license.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of December 11th, in which you state:

"Under Schedule 36.1 and 36.2 of Revenue Bill of 1935, a 'Coal-Coke Dealer or Hauler' tag is required of coal or coke yards and persons selling, distributing or hauling or delivering coal or coke by truck or other vehicle, which tag is to be attached to each truck or other vehicle engaging in such business, and for which such persons are required to pay a registration fee of \$1.00.

"An issuance fee of 50c for each tag so issued, has been collected by numerous Probate Judges. There has been a great many applications for refund of this 50c issuance fee, the licensee contending that it was not a legal charge.

"Please give us your opinion as to whether the Probate Judges of this State are required to charge this fee for such 'Coal-Coke Dealer or Hauler' tags."

Referring to Schedule 36.1, I advise that this levies a license on what are commonly known as coal yards and for the issuance of this license the Probate Judge is entitled to a 50c fee. The Schedule goes on, however, and requires such dealers to register "with the officer in the county collecting and issuing licenses, the number of trucks to be operated from his one or more yards and shall at the time of such registration pay a fee of \$1.00 per truck for each truck so used. * * *" The provision again refers to the fee as a "registration fee".

Section 350 provides in substance that:

"A person shall pay the probate judge the amount required for such license to carry on such business and upon payment of such amount and a fee of 50c to the Probate Judge for the issuance of **such licenses** the same shall be issued."

It would seem that this is a fee for the issuance of licenses as distinguished from the payment of a registration fee as Schedule 36.1 so clearly terms the \$1.00 per truck required to be paid, and that no issuance fee is payable thereon.

With reference to Schedule 36.2, the license, while on the selling, distributing, or hauling of coal, is levied when such business is conducted by particular methods as distinguished from the operation of coal yards and the license is graduated according to the number of trucks used. The license issued and which is placed on the truck is, therefore, the license within the meaning of Section 350 and the payment of the 50c fee to the Probate Judge is proper.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 18, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Mutual Cooperative Marketing and Purchasing Corporations or Associations:

Under Authority of Section 19 of Act No. 220, H. B. 275, approved July 17, 1935, (General Acts 1935, p. 604), Probate Judge in whose office Articles of incorporation are filed, should collect \$10.00 from corporation, \$5.00 to be retained by Probate Judge and \$5.00 to be sent to the Secretary of State for the use of the State, for filing the report of incorporation, and not the certificate of incorporation.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of June 13, 1936, in which you request my opinion as follows:

"Does Section 19 of House Bill No. 275 approved July 17, 1935, intend that the association organized thereunder pay to the Probate Judge ten dollars, five of which the Probate Judge remits to the Secretary of State for filing certificates of incorporation and five dollars remitted direct to the Comptroller for the use of the State?"

In my opinion, the Probate Judge in whose office the articles of incorporation are filed, should collect \$10.00 from the corporation, \$5.00 of which should be retained by the Probate Judge, and \$5.00 should be sent to the Secretary of State, for the use of the State, for filing the report of incorporation, and not the certificate of incorporation.

Section 2 of Act No. 220, provides in part as follows:

"The Articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgements of Deeds and Conveyances, and shall be filed in accordance with the provisions of the general corporation law of this state."

Section 19 of Act No. 220, is as follows:

"Section 19. FEES FOR FILING ARTICLES OF INCORPORATION. For filing articles of incorporation, an association organized hereunder shall pay five dollars to the probate judge in whose office the same is filed; the "Secretary of State for the use of the State shall be paid five dollars for filing certificate of incorporation forwarded by probate judge as provided by law. And for filing an amendment to the articles, two and one-half dollars."

Sections 6967 and 6968 of the 1923 Code of Alabama, provide as follows:

"6967. Filing and recording certificate.—The certificate of incorporation shall be filed and recorded in a book to be kept for that purpose in the office of the probate judge of the county in which the principal business of the corporation is established; but the judge shall not record it unless it complies with the provisions of this article."

"6968. Certificate of registration, fees for recording.—After it has been recorded the probate judge shall endorse thereon his certificate of registration, showing the book and page where recorded, and for his services for recording the certificate shall receive fifteen cents for each one hundred words of the certificate of incorporation, and two dollars and fifty cents for examining the certificate."

The articles of incorporation, as provided for in Act No. 220, are similar to the certificate of incorporation, as provided by the general corporation law of the State.

In my opinion the \$5.00 paid to the probate Judge is for services rendered, for recording and inspecting the articles of incorporation and should be retained by him, to be disposed of as may be provided by law.

Under the general corporation law, the Probate Judge does not file the certificate of incorporation in the office of the Secretary of State, but sends a report of incorporation to the Secretary of State, as provided by Section 6975, of the 1923 Code of Alabama, which is as follows:

"6975. Statement to be filed with secretary of state. Within ten days after the filing of the certificate in the office of the probate judge, as provided, he shall cause to be filed in the office of the secretary of state a statement signed by the probate judge of the county in which the corporation was organized, giving the name of the corporation, the names of its incorporators, the "date of its incorporation, the amount of its capital stock, and the amount thereof actually paid in, and the name of the county in which incorporated. And for filing such statement, there shall be paid in advance, to the probate judge, for the use of the state, a fee of two and one-half dollars."

From the Section, supra, it is my opinion that the Probate Judge should forward the report of Incorporation to the Secretary of State for filing, instead of the Certificate of Incorporation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 18, 1936.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Probate Judge—May deduct commission of 2½% from funds received from issuance of non-resident motor carrier permits under schedule 158.15 as amended.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 10, 1936, requesting my opinion regarding the authority of the Judge of Probate to deduct commissions from funds received from the issuance of non-resident motor carrier permits, under the circumstances set forth in your letter of July 7, 1936, which is as follows:

"In reference to letter of recent rate from Hon. Chas. W. Lee, State Comptroller, in regard to deduction of commissions from Non-Resident

Motor Carrier Permits, we understand that you have made a ruling that the Judge of Probate is not to deduct commission from Non-Resident Motor Carrier Permits. We deducted commissions of 2½% from May and June reports upon instructions from The State Tax Commission stating that we were entitled to same. Up to the present date we have not received such a ruling from you and would appreciate it if you would send us a copy of same."

In my opinion the Judge of Probate may deduct commissions from funds received from the issuance of non-resident motor vehicle permits as provided by schedule 158.18½ of the Revenue Bill of 1935. This section provides, in part, as follows:

"The Judge of Probate shall be entitled to receive two and one-half per cent of the amount of money collected for motor vehicle licenses due the State, which he may deduct from his remittance to the State Treasurer and he shall be entitled to the same amount as compensation for collecting motor vehicle licenses due the county, which amount he may deduct from the payment made by him to the County Treasurer, and he shall be entitled to the same amount as compensation for collecting motor vehicle licenses due the towns or cities, which amount he may deduct from the payment made by him to the Town or City Treasurer, but he shall not be allowed any commission on any money not remitted by him within five days from the end of the month."

Schedule 158.15 as amended, Act No. 177, approved April 21, 1936, authorizes certain non-resident operators of motor vehicles to secure "permits" to enter the State of Alabama upon the payment of a permit fee and an issuance fee to the Probate Judge.

A "license" is defined generally as a "formal or official permit or permission to carry on some business or to do some act which, without the license, would be unlawful." 37 C. J. 167 (note 5). It may be further noted that the words "license" and "permit" are often used synonymously. See 37 C. J. 167 (note 6) citing *Parsons v. People* 76 P. 666, 669 (Colo.); and 2 Cooley on Taxation 3d, Edition 1137, 1150.

I, therefore, advise you that the "permit" provided for by Schedule 158.15 is issued in lieu of the **license** required to be procured by other operators of motor vehicles, that it is in itself a license, and that the rules applicable to such license must likewise apply to the issuance of aforesaid permits.

As stated, supra, Schedule 158.15 as amended provides for an **issuance fee** to the Probate Judge. It is my opinion that this fee was not intended to be the exclusive compensation allowed the Probate Judge for issuing said permit, but that it was to be in addition to the 2½% for remitting license taxes. Cf: Opinion Hon. W. W. Hill, October 7, 1935, (Quarterly Report Vol. 1, page 22, 25).

Accordingly I advise you that the Probate Judge is entitled to deduct commission from funds received from the issuance of non-resident motor vehicle permits.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 18, 1936.

Hon. I. I. Moses,
Chairman, County Commission,
Russell County,
Phenix, Alabama.

Probate Court—Held court of record under the provisions of Section 4557 of Code of Alabama of 1923 and may order inquest under said section.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 10, 1936, in which you request my opinion as follows:

"The coroner of the County has presented the County with a statement for services rendered for the holding of an inquest, wherein there appears on the statement the endorsement of the Honorable C. B. Gullatt, Jr., Judge of Probate of the County, ordering said inquest.

"Under the provisions of Section 4557 of the Code of Alabama of 1923 an inquest may be ordered either by a Judge of Record or Solicitor, provided, that there is reasonable grounds for believing that such death has been occasioned by the act of another by unlawful means.

"Is the Judge of Probate of the County the Judge of a Court of Record within the meaning of this provision of the Code? Your advice about this matter will be appreciated at your earliest convenience."

In my opinion the Probate Court is a Court of Record within the meaning of Section 4557 of the Code of Alabama of 1923. I call your attention to the case of Whitaker v. Kennamer, 229 Ala. 80, 155 So. 855, wherein it was held that a Probate Court is a Court of Record. I quote from the Whitaker case:

"The several statutes (sections 9578-9591, Code) and decisions show the court (Probate Court) to be a court of record and to have the right to render judgments in a proper case nunc pro tunc. 15 C. J. 720; Hall, Amd'r. v. Hudson, Adm'r., 20 Ala. 284; Dabney v. Mitchell, 54 Ala. 198; Campbell v. Beyers, 189 Ala. 307, 313, 66 So. 651; Zaner v. Thrower, 203 Ala. 650, 84 So. 820; Lewis v. Martin, 210 Ala. 401, 98 So. 635."

Accordingly, it is my opinion that an inquest may be ordered by a Judge of Probate under the circumstances set out in Chapter 162, Code of Alabama of 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 18, 1936.

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Attention Hon. Harry Simon, Chief Clerk, License Department.

License—Coal dealers—Schedule 36.2 of the 1935 Revenue Act is not applicable to a man operating a mine and using his own trucks in making

deliveries of coal to retail dealers, this schedule being applicable only to persons selling, distributing, hauling or delivering direct from mine or plant to consumers.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago which follows:

"Would you construe Schedule 36.2 as being applicable to a man operating a mine and using **his own** trucks in making deliveries of coal to **retail** dealers."

Schedule 36.2 reads, in part, as follows:

"Each person, other than those qualified under Section 1 of this schedule, engaged in selling, distributing or hauling or delivering coal or coke by truck or other vehicle whether as dealer, employee, agent, broker, sales agent or mining company sells, or hauls or delivers direct from mine or plant to **consumer** shall pay a privilege license * * *".

Very clearly this Schedule is not intended to apply to persons who only sell, distribute, haul or deliver coal or coke from a mine to retail dealers, since it only deals with persons selling distributing, hauling or delivering coal or coke direct from mine or plant to consumer. Retail dealers resell to consumers. They cannot be held to be consumers within the sense that the word is used in this Schedule.

Therefore, it is my opinion that a man operating a mine and using his own trucks in making deliveries of coal to retail dealers only and not making any such deliveries direct to the consumer is not liable for the license levied by Schedule 36.2, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 18, 1936.

Hon. R. L. Holcombe,
Sheriff, Mobile County,
Mobile, Alabama.

Where the sheriff served the notices required to be issued by Section 4754 and required to be served by Section 4755; he is entitled to the fee provided by Section 3741, or fifty cents for serving such notices.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of June 3rd, in which you state:

"I desire your opinion upon the following question:

"Where the sheriff serves the notice provided for in Section 4755 of the Code of Alabama of 1923, is he entitled to a fee of fifty cents for the service of each such notice as provided for under the general schedule of fees for sheriffs, Section 3741 of the Code of Alabama of 1923?"

"Our County Treasurer is questioning the validity of this fee and has refused to register claims in which this fee is included."

In reply I beg to advise that, in my judgment, you are entitled to the fee provided by Section 3741 for serving the notices required to be served by

Section 4755 of the Code. I have read carefully the opinion of the Court of Appeals in the case of *Holcombe v. Stone*, 155 So. 636, and do not think it limits the total amount of costs to the items therein set out.

Section 4757 provides that condemnation cases shall be tried "in the court as other cases are tried therein".

Section 4754 specifically requires the justice or magistrate to issue the notice to all persons claiming any right, and Section 4755 specifically provides for the service by the officer.

Sections 4756 and 4757 provide for the form and contents for the claimant and the trial and judgment of forfeiture.

Section 4761 provides for the payment of costs and states that if judgment is against one party defendant, he should pay all the costs of the proceeding. There is no provision in the prohibition law for the payment of the clerk's fee or other costs other than this provision and that in Section 4761 which provides for the payment of the cost of the trial. It seems reasonably clear that the \$3.00 fee discussed in *Holcombe v. Stone*, supra, was limited to the service there in question, to wit, the seizure under the search warrant, and that where the sheriff or other officer is required to perform other and different services, he is entitled to fees under the regular schedule. The notice is required to be issued and required to be served.

Section 3741 provides a fee of fifty cents for serving such notice.

It is therefore my opinion that you are entitled to such fee.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 18, 1936.

Hon. A. M. McConnell,
Judge of Probate,
Limestone County,
Athens, Alabama.

Poll Tax—

Poll Tax paid for 1929, though no poll tax for that year was due, cannot be applied to 1928, last year for which poll tax was due but for which no poll tax was paid.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 10, 1936, which follows:

"We have, in this County, a lady voter who paid Poll Tax from 1920 through 1927 and then paid again in 1929. This last payment should have been applied to the year 1928 which was her last year to pay. We have been leaving her name off the Qualified Voting List.

"Is there any law, or ruling from your office, or from the Supreme Court that will give me the authority to place this person on the Qualified Voting List?

"In other words, I would like to know if a person is in good standing as a voter, if he has paid the required number of Poll Taxes, even if some of them were paid for the 'wrong years'".

As I understand the facts detailed in your letter the lady in question paid her poll taxes for the years 1920-1927 inclusive, as they became due, but failed to pay her poll tax for 1928, the last year she was due to pay and then at a later time paid poll tax for the year 1929, even though she was not due any poll tax year for that year. I presume that she was not due poll tax subsequent to the year 1928 because of the fact that she was over 45 years of age after that time.

It is my opinion that the said poll tax paid for the year 1929 cannot be credited to the year 1928. This office in opinions to Hon. T. L. Head, Treasurer, Board of Education, Montgomery County, Montgomery, Alabama, under date of February 19, 1935, Office Edition 2-A, page 168 and to Hon. Chas. E. McCall, State Auditor, Capitol, under date of April 18, 1935, Office Edition 3-A, page 210 held that poll tax, voluntarily, though erroneously paid, could not be refunded. I enclose copies of these opinions for your information.

It is my opinion that there is no more authority for crediting a poll tax erroneously paid for one year for which no poll tax was due to a former year for which poll tax was due but not paid than there is for refunding poll tax erroneously paid.

The Supreme Court of Alabama in the case of *Shepherd v. Sartain*, 185 Ala. 439, at page 458, said:

"Where the records show the payment by a voter of poll taxes for a series of years, with a single omission, and shows also the payment of two such taxes for a single year, thereby showing that he has paid the number of taxes to which he was subject, it will be presumed, nothing appearing to the contrary, that the duplicated payments was intended for the omitted year and it will be treated as so paid."

The reason for such a holding is obvious. In that case the record clearly showed on its face that there was an error on the part of the Tax Collector which should have been and was corrected.

But such is not the situation in the instant case. I think the error here is clearly one on the part of the taxpayer and not of the Tax Collector and the taxpayer cannot receive any benefit from the erroneous payment.

Therefore, it is my opinion that said person is not a qualified elector even though she has paid the required number of poll taxes due, since she has not paid poll tax for each year such tax was due.

It necessarily follows that you are without authority to place such person on the list of qualified electors.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 20, 1936.

Hon. T. J. Bright, Chairman,
Board of Finance and Control,
Cullman, Cullman County, Alabama.

Members Court of County Commissioners cannot receive pay for services rendered in such capacity after passage of H. B. No. 241.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of June 3rd, 1936, in which you request my opinion as follows:

"By reference to H. B. No. 241, Robertson (Cullman) Local Acts of the 1936 Extra Session, approved April 14, 1936, you will note that the Court of County Commissioners was abolished and there was created in lieu thereof a Board of Finance and Control of Cullman County, with the provision that the four Commissioners then serving on the Court of County Commissioners shall, with the addition of a Chairman to be appointed by the Governor, constitute the first Board of Finance and Control. The Chairman of the Board of Finance was not appointed by the Governor until May 13, 1936, and he qualified on May 13, 1936 by taking the usual oath of office and filing his bond. The four original Commissioners made bond in the sum of \$1000.00 each as members of the Board of Finance and Control, and each took the oath of office and filed bonds as indicated below:

Name of Member	Date Taking Oath	Date Bond Filed
W. E. Humphries	April 18, 1936	April 30, 1936
Emmett S. Oden	April 18, 1936	April 24, 1936
R. Lem Bates	April 18, 1936	May 15, 1936
J. Shelly Bond	April 18, 1936	May 15, 1936

"The Board of Finance and Control of Cullman County was called together at 2 P. M. May 14, 1936 for the purpose of perfecting organization, and the minutes show that this meeting was held, and the Chairman declared the Board of Finance and Control fully organized under said Local Act and ready to transact any business which may come before it for attention.

"There has been filed with the Board of Finance and Control claims, by all four of the former members of the Court of County Commissioners, covering the services for looking after the roads and bridges, etc., for the period beginning April 15, 1936 and ending May 13, 1936, the time intervening between the date the Court of County Commissioners was abolished by the said Local Act and the date the Finance and Control Board was fully organized under said Act, and with these facts before you we wish your advice on the following:

"1. Can the present four members of the Board of Finance and Control receive payment for services actually performed in and about the discharge of their duties in inspecting the building or repairing of County buildings, County roads and bridges, during the time intervening between the date said Court of County Commissioners Court was abolished, to-wit: April 14, 1936, and the time said Board of Finance and Control was fully organized, to-wit: May 14, 1936.

"2. If your answer is in the affirmative, then please advise whether or not their basis of compensation would be the per diem and mileage as allowed under Section 6771 of the 1923 Code of Alabama, as amended by the 1931 Acts, (1931 Acts, page 805) or would the compensation be the per diem as prescribed by the Local Act of 1936 above referred to and subject to the restriction of not more than \$75.00 to any of the Board Members during any one month?

"3. If you should hold that these claims could be legally paid and after directing what Act shall control the payment, that is, whether the General Acts or the Local Act, and if you rule that no allowances shall be made to any Commissioner or Board Member for per diem or mileage for inspecting roads, bridges, etc., except when acting under authority of an order of the Commissioners Court previously made, then how can the four members without the Probate Judge, as Ex-Officio Chairman, and without a Chairman of the Board of Finance and Control, make the Minutes showing that such services were previously authorized?

"In order for you to ascertain just the nature of the claims on the part of the four former members of the Court of County Commissioners, I am enclosing herein the claims of Mr. E. S. Coden, one for \$67.95 covering per diem and mileage for the balance of the month of April, 1936, and one for \$53.75 for per diem and mileage through the 13th day of May, 1936, based upon the allowance provided for under Section 6771 of the 1933 Code, as amended.

"With these facts before you, your prompt reply will be appreciated."

I am of the opinion that members of the Court of County Commissioners cannot receive payment for services as members of such Court subsequent to the passage of H. B. 241, Local Acts 1936, approved April 14, 1936.

Section 2 of said Act provides:

"That upon the approval of this Act, the Court of County Commissioners of Cullman County, Alabama as now constituted be and the same is hereby abolished and the same shall cease to exist in and for Cullman County, Alabama."

Section 23 also provides in part:

"That upon the approval of this Act, the Court of County Commissioners of said Cullman County, Alabama, as now constituted shall be abolished and shall cease to exist in and for said County; * * *

The claims submitted by members of the former court include claim for payment for attendance at said Court called together by the Chairman. I am of the opinion that as no such Board existed there will be no authority to make payment for attendance at a meeting of the former Board.

Claims also include request for payment of services rendered in inspecting roads and bridges. As the Court did not exist at the time these services were rendered, I am of the opinion that members would not be entitled to payment for these services as such services could not be authorized.

I am further of the opinion that compensation could not be drawn for the particular service you specify, as members of the Board of Finance and Control during the period in question, as under the new Act, specific provision is made in reference to these matters. This opinion is not to be interpreted as passing on any question except as specifically answered.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 20, 1936.

Hon. W. L. Pratt,
Judge of Probate,
Bibb County,
Centreville, Alabama.

License—Coal Dealers—A coal mining company that has no coal yard or wagon scales, and which sells coal to employees or anyone who may want to purchase coal dumped direct from their tipple is not subject to a license under either Schedule 36.1 or 36.2 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago in which you ask whether or not a coal mining company that has no coal yard or wagon scales but sells coal to employees or anyone who wants to purchase coal dumped from their tipple, is subject to any license.

In reply I wish to advise that it is my opinion that such a company is not liable for a license under either Schedule 36.1 or Schedule 36.2 of the 1935 Revenue Act.

Schedule 36.1 levies a license on persons dealing in coal or coke who maintain one or more established yards with adequate wagon or truck scales from which all retail deliveries are loaded and the license there levied is based on the number of yards so maintained. The coal mining company mentioned by you has no coal yard or wagon scales and clearly could not be subject to the license levied by this schedule.

Schedule 36.2 levies a license on persons, other than those qualified under Schedule 36.1 engaged in selling, distributing, or hauling or delivering coal or coke by truck or other vehicle direct from a mine or plant to consumer. Since the company mentioned by you does not have any truck or vehicle which it uses for the purpose of selling, distributing, hauling or delivering coal or coke, it would not be liable for the license levied by this schedule.

The opinion of this office rendered to you on January 11, 1936, and found in Quarterly Report of Attorney General, Vol. 2, at page 37 deals very nearly with the same set of facts as does this opinion. I find no statement in that opinion which conflicts with the holding here.

Of course, the coal mining company mentioned by you would be liable for the license levied by Schedule 91 of the 1935 Revenue Act on each person engaged in the business of operating a coal mine.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 20, 1936.

Board of Registrars,
Pickens County,
Carrollton, Alabama.

Board of Registrars not required to take action in reference to name of voter purged from list after due process.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of June 9, 1936, which reads as follows:

"The Board of Registrars is confronted with a problem that I have been requested to write to you about, and ask for your opinion on the same.

"Before the day set for purging the list of voters in Pickens County, a list of those who have moved from the county and state was published in the county weekly newspaper, and notices were prepared and given to the sheriff to be served on those who would be stricken from the list unless they appeared and gave their reasons for not having their names stricken.

"When the forms were returned to the chairman of the board by the sheriff, he stated that they should have been prepared in duplicate, in order that he might have copies of each one given him on which to make his returns, and returned only the forms that he had not been able to have served, due to insufficient address, etc.

"The names were duly stricken on the date set for this work, and among them the name of Mrs. Nettie Smith, who had moved from Pickens County to Tuscaloosa, Alabama. She wrote to the Probate Judge for an absentee ballot in the spring, only to be advised by him that her name was stricken from the list of qualified voters of Pickens County.

"Mrs. Smith advises she was given no notice that her name was to be stricken from the list, and no notice was returned to the board stating that she was not found; in fact, we have no record of any service being made or attempt having been made to serve notice on Mrs. Smith. She insists that she wants to vote in Pickens County, and we, as the board of registrars, would like to know what should be done under the circumstances. We should also like to know if these notices should be prepared in duplicate and given to the sheriff to serve after the list has been published and before the date set for purging the list."

It would be proper for the Board of Registrars at the next regular meeting to consider Mrs. Smith's complaint and receive evidence in reference to the facts concerning this matter. If after a consideration of all of the facts it is found that Mrs. Smith did not receive notice in accordance with opinion of this office to Hon. Elvin C. McCrary, Second Quarterly Report, 81, and authorities cited therein, the Board should reinstate Mrs. Smith.

It should be remembered that it is presumed that the sheriff did his duty and actually served Mrs. Smith and it will be necessary for Mrs. Smith in presenting her case to overcome this presumption.

Mrs. Smith could, of course, re-register if she has the necessary qualifications, including residence prescribed by law in your particular community.

For your information, it is desirable that notices be furnished to the sheriff in duplicate.

Yours very truly,
A. A. CARMICHAEL,
Attorney General. /

July 20, 1936.

Hon. J. P. Williams,
Sheriff, Barbour County,
Clayton, Alabama.

Costs—The expense of feeding juveniles committed to the county jail should be charged against the County and not the State.

The expense of feeding insane persons committed to the county jail should be charged against the County and not the State, provided the insane persons have no estate from which said costs can be collected.

The sheriff should be paid the same per diem for feeding juveniles as he is paid for feeding prisoners.

Board of Revenue may contract with the sheriff for feeding insane persons, and may pay the sheriff a different per diem than paid him for feeding prisoners.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of June 18, 1936, with enclosure from the County Attorney.

You request my opinion:

"1. Is the feeding of juveniles and insanes properly charged to the County or State?

"2. Can the Board of Revenue enter into a contract with the sheriff to pay the Sheriff a per diem for feeding juveniles and insane other than set out in the law regulating the feeding of prisoners approved September 6, 1927, amended and approved July 10, 1935."

Answering the first part of your first question, it is my opinion that the expense incurred in feeding juveniles committed to the county jail, should be charged against the County and not the State.

A juvenile is not a prisoner in the general and accepted sense, but is a ward of the county, and, therefore, the law as to feeding "prisoners" has no application to such juvenile, the expense for the maintenance and care of juveniles are proper charges against the county, under authority of Section 3529 of the 1923 Code of Alabama, as amended by Section 2 of Act No. 315, H. B. 744, approved June 29, 1931 (General Acts 1931, p. 356) a part of which is as follows:

"* * * All expenses necessary or appropriate to the carrying out of the purposes and intent of this chapter and all expenses of maintenance and care of children that may be incurred by order of the court in carrying out the provisions and intent of this chapter, shall be valid charges and preferred claims against the county and shall be paid by the county treasurer when itemized and sworn to by the creditor or other person knowing the facts in the case, and approved by the Judge."

Biennial Report of Attorney General, 1930-1932, p. 571; Biennial Report of Attorney General, 1926-1928, pp 540 and 587.

Answering the last part of your first question, I wish to refer you to a part of Section 7287 of the 1923 Code of Alabama, which is as follows:

"Services in relation to persons of unsound mind, the same fees as are allowed for similar services in other cases, to be paid out of the county treasury, if such persons have no estate."

In my opinion the section, *supra*, places the liability for feeding insane persons on the county, provided the insane persons have no estate from which the costs may be collected.

Opinions Attorney General, 1935, Book 3-A, p. 235 (Office Edition)

Opinions Attorney General, 1935, Book 2-A, p. 7 (Office Edition).

Copies of the above opinions are enclosed for your information.

Biennial Report of Attorney General, 1926-1928, p. 274.

Answering the first part of your second question, in my opinion the Sheriff should be paid the same per diem for feeding juveniles as he is paid for feeding prisoners.

I refer you to Section 3558 of the 1923 Code of Alabama, which is as follows:

"Section 3558. Officer serving process, etc., under juvenile courts; costs and fees of.—All **officers** serving process from **juvenile** courts, or feeding prisoners committed by or held for or under such courts, shall receive the same costs, fees and compensation payable in the same manner and from the same **source** as are now allowed and paid for like services with respect to process issued by the **circuit courts** or courts of like jurisdiction, and for feeding prisoners committed by **circuit courts or courts of like jurisdiction.**"

Answering the last part of your second question, in my opinion the Board of Revenue may contract with the sheriff for feeding insane persons, and may pay the sheriff a different per diem than paid him for feeding prisoners.

I refer you to section 2798 of the 1923 Code of Alabama, which is as follows:

"Section 2798. Compensation to persons caring for insane paupers.—The court of county commissioners and county boards of revenue shall provide a schedule of fees in their respective counties, to be paid out of the county treasury on their order, to the county officers, or any person duly deputized by such officers, to temporarily provide for the care and maintenance of any person alleged to be insane, when such person has no means of paying such expense, pending an investigation into the mental status of such alleged insane pauper, before the probate judge of such county. Such judge shall, at the same time hear evidence and decide therefrom the question of the ability of such alleged insane pauper to pay such expenses."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 20, 1936.

Hon. Watkins M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

License—A person who pays the license levied by Schedule 100 of the 1935 Revenue Act for the privilege of engaging in the profession of

either an oculist, optometrist or optician does not have to pay a license levied by Schedule 130 of said Act before he can sell eye glasses or spectacles in the course of the practice of his profession.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your two letters requesting my opinion as to whether or not a person who has paid a license levied by Schedule 100 of the 1935 Revenue Act for the privilege of engaging in the practice of his profession as an oculist, optometrist or optician also has to procure a license under Schedule 130 before he can sell eye glasses or spectacles in the course of his business. Schedule 100 of the 1935 Revenue Act reads as follows:

7515564 "Each oculist, optometrist or optician practicing his profession: in cities or towns of over five thousand (5000) inhabitants shall pay an annual license of twenty-five dollars (\$25.00); in cities or towns of less than five thousand (5000) and more than one thousand (1000) inhabitants, ten dollars (\$10.00); in all other places whether incorporated or not, five dollars (\$5.00); but no license shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person is engaged each oculist, optometrist or optician so engaged shall pay the license as above stated, provided that the license imposed by this Section shall not apply until such oculist, optometrist or optician shall have practiced his profession as long as two years."

You will note that the license levied in this Schedule is on an oculist, optometrist or optician practicing his profession.

7515594 / Schedule 130 of 1935 Revenue Act reads:

"For each person selling spectacles or eye glasses: In cities or towns of fifty thousand (50,000) inhabitants and over, Twenty-five Dollars (\$25.00); in cities or towns of fifteen thousand (15,000) inhabitants and less than fifty thousand (50,000) inhabitants, Fifteen Dollars (\$15.00); in cities and towns of over five thousand (5,000) inhabitants and less than fifteen thousand (15,000) inhabitants, Ten Dollars (\$10.00) in all other places whether incorporated or not, Five Dollars (\$5.00).

This Schedule levies a license on each person selling spectacles or eye glasses. T.H. 5470

Section 2873 of the Code of Alabama of 1923 defines optometry as follows:

"The practice of optometry is defined to be the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its functional powers and adopting mechanical means for the aid thereof."

I do not find where the Legislature or the Courts of this State have given a definition of the profession of an oculist or an optician. However, while there is a technical difference between each of these professions, it is a matter of common knowledge that the professions of oculists, optometrists and opticians are very closely related, and it is my opinion that the Legislature in dealing with these three professions in Schedule 100, supra, dealt with them interchangeably and did not intend to make any distinction between them. This seems to be clearly indicated by the fact that all three professions are dealt with in the same schedule. Under the definition of optometry contained in Section 2873 of the Code, supra, it seems to be very

clear that the selling of spectacles and eye glasses is part of the profession of an optometrist. Likewise, it seems to me that selling spectacles and eye glasses would be part of the profession of an oculist and/or optician, at least in the sense that these terms are dealt with in the 1935 Revenue Act. Therefore, it is my opinion that when a person has paid the license levied by Schedule 100, supra, for engaging in the profession of either an oculist, optometrist or optician he does not have to procure the license levied under Schedule 130 before he can sell spectacles and eye glasses in the course of the practice of his profession.

I arrive at this conclusion notwithstanding the provisions of Section 357 of the 1935 Revenue Act which reads as follows:

"Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

It is my opinion that a person practicing the profession of either an oculist, optometrist or optician who sells spectacles or eye glasses in the course of the practice of his profession is only engaged in the practice of his profession and is not engaged in the business of selling eye glasses or spectacles in the sense that the term "selling spectacles and eye glasses" is used in Schedule 130, supra, which levies a license on such a business. It is my opinion that Schedule 130 was intended to apply to persons who engage in selling spectacles and eye glasses as a business, and not to those persons who incidentally sell them in the course of the practice of their profession as either oculist, optometrist or optician as the case might be.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 20, 1936.

Hon. J. L. Kaufman, Chairman,
Unemployment Compensation Commission,
Capitol.

Unemployment Compensation—Duties of treasurer defined by Section 3(c) S. B. 395, Stephens.—Acts 1935, page 950.

Amount of bond of treasurer held to be subject to be prescribed by Unemployment Compensation Commission and to be approved by the Governor.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of July 10, 1936, requesting my opinion as follows:

"Section 3(c) of Senate Bill 395, Acts of 1935, page 950, by Stephens being the Act creating the Alabama Unemployment Compensation Commission, provides as follows:

"Treasurer. The Commission shall designate a treasurer of the fund, who shall pay all vouchers duly drawn upon the fund, in such manner as the commission may prescribe. He shall have custody of all moneys belonging to the fund and not otherwise held or deposited or invested pursuant to this Act. The Treasurer shall give

bond conditioned on the faithful performance of his duties as treasurer of the fund, in a form prescribed by statute or approved by the attorney general, and in an amount specified by the commission and approved by the governor. All premiums upon bonds required pursuant to this section when furnished by an authorized surety company or by a duly constituted governmental bonding fund shall be paid from the unemployment administration fund. The treasurer shall deposit and/or invest the fund under the supervision and control of the commission, subject to the provision of this Act."

"I would like to have your opinion regarding the duties of such treasurer of this Commission, and also your opinion as to the amount of bond for same which shall be furnished by such treasurer.

"Inasmuch as the Commission is withholding the appointment of a treasurer until receipt of your opinion, could I very respectfully and earnestly request that you let me have this opinion at your earliest convenience."

In reply I wish to advise that in my opinion the duties of the treasurer are set out in Section 3(c) of Senate Bill 395, Stephens, Acts 1935, page 950, quoted by you in your request as follows: "who shall pay all vouchers duly drawn upon fund, in such manner as the Commission may prescribe. He shall have custody of all monies belonging to the fund and not otherwise held or deposited or invested pursuant to this Act.* * * The treasurer shall deposit and/or invest the fund under the supervision and control of the Commission subject to the provisions of this Act."

This section expressly charges the treasurer with the duties therein named.

You ask what amount of bond the treasurer should post.

In my opinion, the law does not specify any exact amount of bond that the treasurer must give, but requires the Commission to specify the amount of bond to be required of the treasurer subject to the approval of the Governor.

I might suggest that the bond given by the treasurer should be in such amount as to be at least equal to the maximum sum that the treasurer will be required to handle at any one time.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 20, 1936

Mrs. Sally Johnson Roberts,
Register, Circuit Court,
Chilton County,
Clanton, Alabama.

A petition by the respondent in an original divorce suit to be permitted to re-marry does not carry a trial tax.

Where there is a petition in the Circuit Court for divorce and the cost is assessed against the complainant, he cannot be required to pay the cost in the original suit before being granted decree to re-marry.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 22, 1936, in which you request my opinion as follows:

"Would you please advise me if a 'Petition to re-marry' can be filed in the original divorce case, and if so, should the \$3.00 trial tax be collected.

"Also, would you advise that where the Complainant in a divorce case was assessed with cost and said cost having not been paid when respondent in said case asks for petition to re-marry can petitioners papers be held up until said cost is paid?"

Answering your first inquiry, I call your attention to an opinion of this office written July 20, 1935, to Hon. Chas. W. Lee, State Comptroller, (Office Edition, Opinions of the Attorney General, Bk. 5-A, page 276). I am enclosing you a copy of this opinion, which I think answers your inquiry.

My answer to your second inquiry is in the negative. The matter of collection or payment of cost is a civil proceeding. See Parker's case, 83 Ala. 269. It is my opinion it cannot become a penalty. Under the law, you can issue execution against the complainant for the cost in the original case and in this way compel the payment of same. But I do not think that because he has failed or refused to pay the cost in the original case the court can close its doors to him and compel payment of cost which accrued in another case before he is permitted to proceed and thus preclude him for redressing a wrong or enforcing a remedy.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 20, 1936.

Hon. D. A. McGregor,
Register Circuit Court of Walker County,
Jasper, Alabama.

Court costs—When a juvenile delinquent appeals from a judgment of the Juvenile Court to the Circuit Court, in Equity, as provided for by Section 3538 of the 1923 Code of Alabama, and the judgment is affirmed, the State is not liable for the court costs that have accrued.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of April 14, 1936, in which you state:

"Section 3537 of the 1923 Code of Alabama provides for the detention and commitment of children, juvenile delinquents and triable by the Judge of the Juvenile Court.

"Section 3538 of the 1923 Code provides for appeal to be taken by the juvenile delinquent to the Circuit Court and there to be tried by the Judge of said Court sitting as a Court of Equity.

"Recently two of these juvenile delinquent cases were appealed to this the Circuit Court of Walker County, Alabama in Equity. These two appeals were permitted by the Judge of the Juvenile Court by the juvenile delinquent entering into bond signed only by the delinquent and without any additional surety.

"These two juvenile delinquent cases were tried in this Court on the appeal by Hon. R. L. Blanton, Judge of said Circuit Court, in Equity, on the 8th day of April, 1936 and he is as such Judge of the Circuit Court adjudged the defendants juvenile delinquents and wards of the State of Alabama and committed them to the Alabama Boys' Industrial School.

"These two cases Numbers 233 and 234 are entered upon the dockets of this Court against these two juvenile delinquents separately with the State of Alabama as complainant in each of the cases.

"The cases having been disposed of, and no bond with surety having been given by the delinquent on appeal, there is no one to pay the cost of this Court on such appeal.

You request my opinion:

"Please advise me whether or not the State of Alabama should be taxed with the payment of the court cost in this Court which has accrued by reason of said appeal and if the State of Alabama should be charged with the payment of the cost then please advise to whom I should render a bill for payment.

"I understand that I cannot under the law issue an execution against the State of Alabama, and I also understand that where the State of Alabama institutes a proceeding of this character, the trial tax of \$3.00 due to the State and County would not be paid by the State notwithstanding the State did or would pay the balance of the cost in the case. This rule under an opinion rendered by former Attorney General of Alabama.

"Kindly let me have your opinion on this question of taxing and payment of cost."

In my opinion your question should be answered in the negative.

The State does not pay any costs that are not specially provided for by statute.—**Quarterly Report of the Attorney General, Vol. II, p. 10.**

In the case of *Green County v. Hale County*, 61 Ala. p. 72, the Supreme Court of Alabama said the State is not chargeable with costs created in the prosecution of a person indicted for a violation of law, whether the defendant be convicted or acquitted, unless it has consented or provided by statute that they may be charged against it.

In the case of *State, ex rel. Pollard v. Brewer*, 59 Ala., p. 130, the Supreme Court of Alabama said:

"The statutes which allow fees to sheriffs and other officers for services rendered in prosecutions by the State for criminal offenses, and in executing judgments rendered in such prosecutions, are statutes which give costs and must be strictly construed—they can not be extended beyond their letter. It is a principle of the common law, that such statutes, (as it is in reference to all general statutes) do not extend to, and embrace the sovereign, subjecting him to disability, or to liability, unless it is so expressly provided. 'The king (and any person suing to his use)

shall neither pay nor receive costs', was the rule at common law; and the general words of statutes giving costs, did not include the sovereign. The same principle has been applied to the governments, State and Federal, in this country in civil and criminal causes. Those who accept public offices which require them to render services to the State, must take the office cum onere—the rendition of such services gratuitously, unless by express statutory provision, compensation is fixed, and an express liability for its payment imposed on the State."

As I have been unable to find any statute authorizing the State to pay the costs in cases appealed under Section 3538 of the 1923 Code of Alabama, it is my opinion that the costs should not be taxed against the State of Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 21, 1936.

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Probate Judge—Fee for notice to delinquent property owner.

1. Said fee provided by Section 239 of the 1935 Revenue Act for performing service required of the Probate Judge by Section 217 of said Act accrues and becomes chargeable against the taxpayer only when service has been performed and a taxpayer who has paid his taxes before that time does not have to pay the same.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago, which follows:

"Section 239 of Revenue Act of 1935, General Acts of Alabama 1935, page 359, reads in part as follows: For each notice to a delinquent property owner to show cause why a decree of sale should not be rendered, the Judge of Probate is entitled to a fee of twenty-five cents and for each decree of sale, twenty-five cents. See also Sections 216-7 of the Revenue Acts of 1935, General Acts of Alabama, page 352.

"On the 29th day of February the Tax Collector delivered to the office of the Judge of Probate his report of unpaid taxes as provided for in Section 216. My office is now engaged in preparing the notices to the delinquent taxpayers. It is reasonable to expect that during the time for the preparing of these notices some of the taxpayers on this list will pay to the Collector the delinquent taxes. What is your opinion as to the exact time that the cost of notices should be added to the amount due by taxpayers, should the notice fee be collected by the Tax Collector on each piece listed to the Probate Judge whether or not the actual notice has been served or should this amount be added only to the account of the taxpayers who actually have been served."

Under Section 217 of the 1935 Revenue Act, the Probate Judge is required, as soon as practicable after he receives from the Tax Collector the list of

delinquent taxpayers, to prepare notices to said delinquent taxpayers to appear before him at a certain time to show cause why he should not enter a decree of sale of their property, and turn these notices over to the Tax Collector for service on the taxpayers. For performing this service the Probate Judge is entitled to a fee of twenty-five cents for each such notice, as provided by Section 239 of said Act.

This fee accrues and should be charged when the service has been performed. Opinion to Hon. John I. Smith, Tax Collector, Etowah County, Gadsden, Alabama, Quarterly Report Attorney General, Vol. 1, at page 330; but the Probate Judge is not entitled to the same until he has performed the service for which the fee is allowed. This service has not been performed until the notice is prepared by the Probate Judge and delivered by him to the Tax Collector for service on the taxpayer.

Therefore, it is my opinion that if a taxpayer pays his taxes subsequent to the time the Tax Collector turns over to the Probate Judge the list of delinquent taxpayers, but prior to the time the Probate Judge prepares the notice and delivers the same to the Tax Collector for service as required by Section 217 of the 1935 Revenue Act, the fee provided by Section 239 of said Act for performing this service does not accrue and the taxpayer does not have to pay the same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 22, 1936.

Hon. J. Percy Oliver,
Judge of Probate,
Tallapoosa County,
Dadeville, Alabama.

Interest on road and bridge bonds may be paid from road and bridge fund provided the same was voted for such purpose and not more than one-third of the gasoline tax received by the counties from the State may be used in payment of debts created prior to March 26, 1936, for the construction and maintenance of roads.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of recent date in which you state:

"In 1917 Tallapoosa County issued \$200,000.00 road and bridge bonds. These bonds were issued and the proceeds used exclusively for road and bridge purposes. Up to this time the interest, 5%, amounting to \$10,000 per annum, payable semi-annually, has been paid from the general funds of the County. This is not an obligation against the general funds, and I would like for you to give me an opinion authorizing payment to be made from the Road and Bridge Funds, if in your opinion this would be proper."

I am of the opinion that it would be proper for the interest on the road and bridge bonds to be paid from the Road and Bridge Fund, subject to certain limitations.

The road and bridge fund proper is derived from constitutional taxes (Section 215 Constitution 1901). This fund may be spent for any debt or

liability created for roads or bridges (provided that is the purpose stated in the election levying such tax).

The portion of the gasoline tax levied by the State and appropriated by the State to the several counties is required to be used exclusively for the construction and maintenance of public roads. (Schedules 156.9 and 156.11 of the 1935 Revenue Act)

However, by Act No. 153, H. 61, Castleberry, approved March 26, 1936, an amount not to exceed one-third of the gasoline tax received by the County may be used in payment of any debt previously incurred by the County for the construction and maintenance of public roads.

I am therefore of the opinion that subject to these limitations payment of interest may be made from the Road and Bridge Fund and the gasoline fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 22, 1936.

Hon. J. R. Copeland,
Judge of Probate, Blount County,
Oneonta, Alabama.

1. County Farm Agents in Alabama are selected in a manner mutually agreed upon by the United States Secretary of Agriculture and the State Agricultural College of Alabama, and Courts of County Commissioners, Boards of Revenue or like governing bodies have no authority whatever in their selection, and are without authority to discharge them after they have been selected.

2. When an election is held in a County under the provisions of Act No. 144 (General Acts 1935, p. 180) approved June 21, 1935, and the result of the vote at said election is in favor of an appropriation by the County for the purposes mentioned in said Act, then the Court of County Commissioners, Boards of Revenue or like governing body of the County must make an appropriation for this purpose in the amount authorized at the election, and it has no discretion in the matter.

3. The funds so appropriated, should be paid out, from time to time, on warrants drawn by the Judge of Probate, based upon valid and proper claims against said appropriation, which have been presented to, and audited and allowed by, the Court of County Commissioners, as provided by Section 224, Code of Alabama, 1923.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

This acknowledges receipt of your letter of January 18, 1936, and subsequent letters pertaining thereto.

Your letter of January 18, 1936, follows:

"In accordance with an act of the Legislature No. 144, House Bill No. 314, approved June 21, 1935, on an appropriation under the terms of the above mentioned bill, and as a result of said election a majority voted in favor of the appropriation, said appropriation to be used for the ex-

clusive purpose of assisting in employing county farm and home demonstration agents in cooperation with the Extension service created under an Act of congress of the United States approved May 8th, 1914, and generally known as the "Smith-Lever Act." At the regular December term 1935 of the Commissioners Court of said County an order was made and entered on the minutes of said Court granting the appropriation as voted.

"At the August term 1935 of the Blount County Commissioners Court an order was made and entered on the minutes of the court discharging the county farm agent and the vacancy ordered to be filled by a suitable qualified person to be selected by the court, and no agent has as yet been selected by the court to fill the said vacancy, and in granting the above appropriation referred to, no one was designated to whom the money should be paid.

"Would I be authorized under the above circumstances without an order of the Commissioners Court designating to whom the money should be paid to pay out the appropriation? If not, who has the authority to designate or employ the county farm and home demonstration agents."

The Act of the Federal Government which set up the Cooperative Extension Service is commonly known as the Smith-Lever Act and was passed on May 8, 1914. This Act is found in U. S. C. A. Title 7, Section 341-348, inc.

Section 342 of said Act provides in part as follows:

"* * * and this work shall be carried on in such manner as may be mutually agreed upon by the Secretary of Agriculture and the State Agricultural College or Colleges * * * *."

Nowhere in the Act is there any specific provision as to how county farm agents shall be selected or appointed. The only provision of the State law on this subject is found in Section 3 of Act No. 26, General Acts 1911, at p. 14, approved February 11, 1911, which reads:

"Section 3. That local agents who shall have charge of the farm demonstration work in the respective county or counties of the State of Alabama where the work is in cooperation with the United States Department of Agriculture shall before appointment be jointly recommended for appointment by the board of agriculture, provided for by this act and the State agent of the farm demonstration work. If the United States Department of Agriculture withdraws its farm demonstration work from any county or counties of the State of Alabama the local agent for the demonstration work may be appointed by the board of agriculture herein provided for."

This provision is codified in Section 3 of Article 41 of the 1923 Agricultural Code, which is Act No. 376, (General Acts 1923, at page 399,) approved Sept. 27, 1923, as follows:

"Section 3. The County Farm Demonstration Agents who shall have charge of the farm demonstration work in the respective County or counties of the State of Alabama, shall, before appointment, be jointly recommended for appointment by the State Board of Agriculture as created in Article 2, Section 1, of this Act, and the State Agent of Farm Demonstration Work in Alabama."

However, subsequent to this time, the Legislature adopted the Agricultural Code of 1927, and this Code, as subsequently amended by the Legislature, is the existing Agricultural Code.

Sections 19 and 20 of the Agricultural Code of 1927, *supra*, read as follows:

"19. Purpose of Article.—To prevent conflict or overlapping of work by the agricultural agencies of the State, to coordinate and secure the best possible relations of such agencies in the work of advancing agriculture in Alabama, it is the purpose of this Article to: Define the recognized agricultural functions of the state and assign to the Department of Agriculture and Industries its proper work."

"20. Agricultural Functions of the State.—The Agricultural functions of the State are a college teaching function for the education of young men and women, a research or experiment station function, an extension teaching function, and an executive or law enforcing and regulatory function."

Extension work is defined by Section 22 of the 1927 Agricultural Code, *supra*, in this manner:

"22. Extension Work. Extension work is necessarily a corollary of experiment station work and agricultural college teaching and as applied to these functions has reference to making available to all the people scientific and practical agricultural and home making instructions and information and is as authorized by the Smith-Lever Extension Act of Congress in 1914 and defined in Section 2 thereof, as follows:

"That cooperative agricultural extension work shall consist of the giving of instruction and practical demonstration in agriculture and home economics to persons not attending or resident in said colleges in the several communities, and imparting to such persons information on said subjects through field demonstrations, publications, and otherwise; and this work shall be carried on in such manner as may be mutually agreed upon by the Secretary of Agriculture and the State Agricultural College or colleges receiving the benefits of this Act."

"As applied to these functions, Extension work is also the teaching of the fundamental principles which underlie successful cooperative organization and marketing of farm products. Extension work may also embrace the giving of information about regulatory or administrative law or the regulation and the necessity for an advantage of their observance when such giving of information is an incidental and secondary consideration to the teaching of the Extension problem at hand."

While Section 25 of said Code is as follows:

"25. Field Work of Department.—The Department of Agriculture and Industries, under this plan, shall confine its activities to the regulatory, control and administrative work, including the necessary presentation of this work to the public."

These Sections evidence a clear intention on the part of the Legislature to define the recognized agricultural functions of the State, and to confine each Agricultural Department to its proper field of work. The Department of Agriculture and Industries is given no supervision or control whatever over agricultural extension work. This work is left entirely to the Extension Department. Nowhere in the 1927 Agricultural Code is there any provision relating to the employment of county agents. The provisions of the 1911 Act, *supra*, and the 1935 Agricultural Code, *supra*, in this regard, was omitted from the 1927 Agricultural Code. Therefore, I am constrained to hold that the same are repealed thereby and that there is no existing State law on this

subject to-day. The 1927 Agricultural Code is a new enactment of the Legislature completely covering the entire field of the 1923 Agricultural Code. It is a well known rule of statutory construction that a subsequent legislative act on the same subject and completely covering the entire field of a former act, supersedes and repeals the provisions of the former Act. The only authority which Courts of County Commissioners or Boards of Revenue or like governing bodies have in regard to Agricultural Extension work is that given by Subsection 18 of Section 6755 of the Code of Alabama, 1923, which follows:

"The Court has authority. 18.—Where State or Federal authorities have taken up the work of farm demonstration, or the organization of farm life clubs for the promotion of agriculture, to appropriate for aiding in such work such sum or sums as the county commissioners or board of revenue may deem adequate and necessary."

This Section gives to the Court of County Commissioners, Boards of Revenue or like governing bodies discretionary authority to appropriate such sums to aid in this work as it "may deem adequate and necessary."

Under this authority, the Court might, in the exercise of its discretion, refuse to appropriate any sum for this purpose or it might discontinue an appropriation already made. But this does not give to the Court any authority whatever to employ county farm agents, to approve or disapprove those persons selected for these positions in a manner mutually agreed upon by the United States Secretary of Agriculture and the State Agricultural College of Alabama, or to discharge them after they have been so selected. It is a well known rule that Courts of County Commissioners, Boards of Revenue or like governing bodies are courts of strictly limited jurisdiction and can exercise only such powers as are conferred upon them by statute.

I am advised that the practice of the Agricultural Extension service in selecting county farm agents which has been "mutually agreed upon" by the United States Secretary of Agriculture and the State Agricultural College of Alabama, is that the State Extension Director nominates persons to fill these positions, always endeavoring, I understand, to select persons to meet with the approval of the Courts of County Commissioners, Boards of Revenue or like governing bodies and the farm people who are to be served and that the names of these persons so nominated are sent to the United States Director of Extension for his approval. When they are approved by him, they then become the County Farm Agent for the respective counties for which they were nominated, and they serve at the pleasure of the State Director and the United States Director of Extension.

It is my opinion that this method of selection is in accordance with the provisions of Section 342 of the Smith-Lever Act, *supra*, and is not in conflict with any statute of the State of Alabama.

Since, as above stated, there is no statutory authority giving courts of county commissioners, boards of revenue or like governing bodies any power in this matter, it is my opinion that the county agents are properly selected as set out above, which is the manner mutually agreed upon by the United States Secretary of Agriculture and the State Agricultural College of Alabama, and that Courts of County Commissioners have no authority whatever in the matter and are without authority to discharge persons so selected for these positions.

Therefore, the Court of County Commissioners of Blount County had no authority to make an order at its August Term, 1935, discharging the

County Farm Agent of Blount County and ordering the vacancy filled by a suitable qualified person to be selected by the Court.

Under the authority given Courts of County Commissioners, Boards of Revenue or other like governing bodies by subdivision 18 of Section 6755 of the Code of 1923, *supra*, the Court of County Commissioners of your County, at its August term, 1935, could have discontinued the appropriation made by it, to aid in Agricultural Extension Work in the County. However, you state that an election was held in your County on November 12, 1935, in accordance with the provisions of Act 144, (General Acts 1935, p. 180), approved June 21, 1935, which resulted in a majority vote in favor of an appropriation to be used for the purposes mentioned in Act No. 144, *supra*. After this election was held, the Court of County Commissioners of Blount County, no longer had any discretion as to whether or not it would make an appropriation for this purpose. It had to make the appropriation in the amount authorized at the election, and your Court of County Commissioners properly made an order at its December Term, 1935 granting the appropriation for this purpose which was voted at the November 12th election.

You ask if you would be authorized under the above circumstances, without an order of the Commissioners Court designating to whom the money should be paid, to pay out the appropriation, and further who has the authority to designate or employ the County Farm and Home Demonstration Agent.

I have already answered the latter part of your question, and have advised you how County Farm Agents should be appointed. The same method of selection applies to Home Demonstration Agents.

In answer to the other part of your question, I advise that the money appropriated by the Court of County Commissioners in accordance with the election held on November 12, 1935, should be paid out, from time to time, upon warrants drawn by you, based upon valid and proper claims against said appropriation, which have been presented to, and audited and allowed by, your Court of County Commissioners, as provided by Section 224 of the Code of Alabama, 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 24, 1936.

Dr. J. A. Keller,
Superintendent,
Department of Education,
Montgomery, Alabama.

State may not pay interest on its indebtedness in absence of valid contract or statute.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of March 25, 1936, in which you request my opinion as follows:

"On December 20, 1929, the State Board of Education awarded to the A. J. Honeycutt Company contract in the amount of \$332,535.00 for

the erection of two buildings on the campus of the State Teachers College at Jacksonville, Alabama.

"The erection progressed to the extent that the Teachers College began using the buildings on December 4, 1930, although official acceptance had not been effected on that date.

"About this time the A. J. Honeycutt Company got into financial difficulties and the balance due of \$15,000 on above mentioned contract was turned over to the Birmingham Trust & Savings Company, Birmingham, Alabama. My understanding is that this amount was to be paid upon unconditional acceptance of the buildings by the Board of Education.

"Time passed and, no cash being available to pay balance on the contract, the State Board of Education gave to the Birmingham Trust & Savings Bank a 6% note dated May 1, 1932 for the balance due on the contract.

"On November 4, 1932, it was agreed by the A. J. Honeycutt Company and Dr. Daugeette, President of the Jacksonville State Teachers College, that the buildings were finally accepted as complete on April 1, 1931. Dr. Daugeette further agreed that interest on the balance due of \$15,000.00 should be paid from date of final acceptance of the buildings, even though the note acknowledging the debt was dated May 1, 1932.

"By authority of Act No. 441 of the Legislature of Alabama, approved September 13, 1935, this Department, acting for the State Board of Education, desires to settle the claim of the Birmingham Trust & Savings Company. There seems to be no question that the \$1050.00 interest on the \$15,000.00 note dated May 1, 1932, should be paid by the State Board of Education under the above mentioned Act. However, it is not clear whether the State Board of Education can pay the claim of \$975.00 for interest on the \$15,000.00 balance due from the date of acceptance of the buildings to the date of the aforementioned note.

"In your opinion, have I, acting for the State Board of Education, the legal authority to pay to the Birmingham Trust & Savings Company, from the appropriation made in Act No. 441, the amount of \$975.00 as interest on \$15,000.00 balance due on the A. J. Honeycutt Company's contract, said interest being for the period from April 1, 1931, the date of the unconditional acceptance of the buildings, to May 1, 1932, the date of the note given by the State Board of Education for the balance due on the buildings? I shall thank you for an opinion and, in connection with this case, attach the following papers:

"1. Contract between the State Board of Education and the A. J. Honeycutt Company.

"2. Note for \$15,000.00 dated May 1, 1932, signed by B. M. Miller, A. F. Harman and C. W. Daugeette in favor of the Birmingham Trust and Savings Bank.

"3. Claim of Birmingham Trust & Savings Company, together with four pages of supporting evidence labeled Exhibits "A", "B", "C", and "D".

"Note: I also wish to refer you to the file of the Birmingham Trust and Savings Company on this subject. The file may be secured from Mr. W. W. Brooks of the State Treasurer's Office."

The State is not liable to pay interest in the absence of contract to pay interest. This principle is expressed in the case of *United States vs. North Carolina*, 136 U. S. 211, 10 S. Ct. 920 34 L. Ed. 336, quoted with approval in the case of *Treadway v. Terrell*, (Fla.) 158, in the following words:

"A state is not liable to pay interest on its debts unless its consent to do so has been manifested by an Act of its legislature, or by a lawful contract of its executive officers."

"Such immunity is an attribute of sovereignty and is implied by law for the benefit of the State." *Treadway v. Terrell*, supra.

I am of the opinion that the note which you enclose, dated May 1, 1932, is such a contract and bears interest from the date of its making. However, I do not believe that Dr. Daugette would have authority to contract to pay interest prior to this date.

Further, I note that the agreement contained in the contract, Article V, provides in reference to final payment:

"Upon receipt of written notice that the work is ready for final inspection and acceptance, the Architect shall promptly make such inspection, and when he finds the work acceptable under the Contract and the Contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in this contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the Contractor, and noted in said final certificate, is due and payable.

"Before issuance of final certificate the Contractor shall submit evidence satisfactory to the Architect that all payrolls, material bills, and other indebtedness connected with the work have been paid."

I do not find in the papers submitted any final certificate issued by the architect. In the absence of such certificate or some satisfactory evidence explaining the absence of such certificate the State ordinarily would not be liable for final payment; and if the liability to pay had not become fixed, there would certainly be no liability for interest.

Both of the above objections however could be waived by an Act of the Legislature. There is no provision in the Constitution expressing the immunity of the State from liability for interest payments, and "the immunity may be waived in any way that is manifested or authorized by statute." (Quotation from *Treadway v. Terrell*, supra).

I am of the opinion that the Act which you cite (Act No. 441, General Acts, 1935, p. 917) is such a waiving of the immunity on the part of the State to pay interest during the questioned period (that is, from April 1, 1931 to May 1, 1932). I find from information furnished that this particular indebtedness was included in a mimeographed report from the State Teacher's Colleges which was presented to the members of the Legislature (page 5, item of indebtedness of certain report). I also find this item listed in typed information which I understand was placed before the legislature at the time of the passage of Act No. 441, supra.

I am therefore of the opinion that the Legislature had waived this immunity by an appropriate Act and has approved payment of the interest

in question and that the entire \$2,025.00 may be paid to the Birmingham Trust and Savings Company.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 24, 1936.

Hon. R. H. Williams,
Judge of Probate,
Marshall County,
Guntersville, Ala.

License—Veterans exemption—Veterans properly qualified for exemption under Act No. 494, General Acts 1935, page 1057, approved September 13, 1935, are entitled to the exemption provided in Act No. 494, supra, from the licenses levied by Schedules 146 and 147 of the 1935 Revenue Act unless they are operating what are commonly termed "rolling stores".

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 27, 1936, as follows:

"Please advise me whether a veteran with 25% or more disability would be entitled to exemption under Schedule 146 Revenue Code 1935, that is where he operates as a transient vendor or peddler using a vehicle other than a motor vehicle.

"Also please advise whether a veteran would be entitled to exemptions under Schedule 147 in view of the last paragraph which reads 'Provided further, the taxes herein levied are not subject to any specific exemption.'

"I can find no opinion covering these matters in previous reports."

It is my opinion that a veteran who is properly qualified under Act No. 494 General Acts 1935, page 1057, approved September 13, 1935 is entitled to the exemption there granted from the licenses levied under Schedules 146 and 147, 1935 Revenue Act, provided he is not operating what is commonly known as a "rolling store". For your information, I call your attention to an opinion of this office addressed to Hon. D. E. Laslie, Judge of Probate of Tuskegee, Alabama, dated October 29, 1935, Quarterly Report of Attorney General, Vol. I, page 133, which holds that a war veteran engaged in the business of what is commonly known as a "rolling store" is not entitled to any exemption whatever from license taxes. See also opinion to Hon. L. W. Price, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of March 4, 1936, Quarterly Report of Attorney General, Vol. II, page 314, which holds to the same effect.

However, this office has also held that the Veterans Exemption Act referred to above, is applicable to persons engaged in peddling. For opinions in this regard, I call your attention to an opinion rendered to Hon. N. P. Tompkins, Judge of Probate, Colbert County, Tuscumbia, Alabama, under date of December 9, 1935, Quarterly Report of Attorney General, Vol. I, page 231, and to Hon. Roy Sanderson, Judge of Probate, Marion County, Hamilton, Alabama, under date of February 26, 1936, Quarterly Report of Attorney General, Vol. II, page 214.

Therefore, I advise you that veterans properly qualified under the Veterans Exemption Act, *supra*, are entitled to exemption from licenses levied under Schedules 146 and 147 of the 1935 Revenue Act unless they are engaged in the business of operating what is commonly known as a "rolling store".

The fact that Schedule 147, *supra*, provides in the last paragraph that the taxes therein levied are not subject to any specific exemption and that Section 368½ of the 1935 Revenue Act provides that exceptions and exemptions from license or privilege taxes levied by this Act which are granted by this Act are declared to be exclusive, does not operate to deny a properly qualified veteran the appropriate exemption under Act No. 494, *supra*, since it was passed subsequent to the date of passage of the 1935 Revenue Act and repeals the provisions of the 1935 Revenue Act insofar as they conflict with its provisions.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 24, 1936.

Hon. Melvin Hutson, Solicitor,
8th Judicial Circuit,
Decatur, Alabama.

Act No. 56, approved March 26, 1936, amending Section 6667 of Code, held not to affect the time and manner of solicitor making reports under Section 5502 of Code.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I wish to acknowledge receipt of your letter of June 8, 1936, which is as follows:

"Since the legislature abolished the terms of court, when shall we make reports? Shall we make them at the end of the year or semi-annually, as we have been heretofore doing?"

In my opinion the Act in question does not in any way affect or change the law as heretofore existing in Section 5502, with respect to the time and manner of filing reports.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 24, 1936.

Hon. Frank M. Johnson,
Judge of Probate,
Winston County,
Double Springs, Ala.

License—Fur dealers and fur catchers—

1. Person paying fur dealer's license may hire other men to buy furs for him provided such men do not maintain or buy from an established place of business separate and apart from the place of business for which the employer has paid fur dealer's license; and provided further that

purchases so made by them are confined to the county in which the employer has purchased his license.

2. A fur catcher must first procure the fur catcher's license provided by Section 10 of Act No. 383, General Acts of 1935, page 813 approved September 9, 1935, before he can catch fur bearing animals and must also purchase the tags provided by said section and place them on the furs, skins or pelts which he sells or offers for sale before he sells or offers the same for sale.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago, in which you request my opinion on the following statement of facts:

"A purchases a fur dealer's license. Can he hire other men to buy furs for him or shall each person be due a fur dealer's license?"

"A also purchases a fur catcher's license in order that he may buy tags for his furs. Can he not place the tags on furs after they are brought to his office and sold to him and charge the catchers for the tags, instead of the catcher purchasing the tags and placing the same on the furs?"

Schedule 71 of the 1935 Revenue Act reads as follows:

"Each person dealing in hides or furs, whether principal business or not: In counties of one hundred thousand inhabitants or over, twenty-five dollars; in counties of forty thousand inhabitants and less than one hundred thousand inhabitants, twenty dollars; in counties of less than forty thousand inhabitants, fifteen dollars. Provided, however, that the license herein fixed shall not apply to persons dealing in cattle, sheep, goat or horse hides."

It is my opinion that a person who procures a license under this schedule may employ other persons to buy furs for him without the necessity of these persons also paying the license provided by this schedule provided that such buyers do not maintain or buy from an established place of business separate and apart from the place of business of their employer for which the fur dealer's license has been paid; and provided further that the purchases so made by them are confined to the county in which the license of their employer was issued. Of course, if such persons engage in the business of a fur dealer by maintaining and buying from an established place of business separate and apart from the place of business for which their employer has paid the license levied by Schedule 71, *supra*, then they would be subject to the same license as their employer.

For your information I call your attention to the fact that there is also levied on persons engaged in the business of dealing in furs a license provided by Section 18 of Act No. 383, General Acts, 1935, page 813, approved September 9, 1935. This section provides, however, that a person who takes out a license under this section is entitled to have the amount of the license required to be paid to the State under Schedule 71 of the General Revenue Act, which is the schedule levying a license on fur dealers, deducted from the amount of the license required to be paid by this section. This section refers to Schedule 73. This is very obviously a clerical error. It is very clear that it was the intention of the Legislature that it should refer to Schedule

71 of the 1935 Revenue Act, since this is the schedule of the Revenue Act which levies a license on this same business.

Therefore, a person wishing to engage in the business of a fur dealer would have to comply with the provisions of Section 18 of Act No. 383, supra, as well as the provisions of Schedule 71 of the 1935 Revenue Act, supra, before he would be entitled to engage in such a business.

Section 10 of Act No. 383, supra, is the Act which levies a license on fur catchers and provides for tags to be placed on each fur, skin or pelt before the same is sold or offered for sale. I call your attention to the following excerpt from Section 10, supra:

"In addition to the license provided in this section, the holder thereof shall be required to procure from the Probate Judges or other persons authorized to issue hunting licenses, stamps or tags to be furnished by the commissioner to those issuing hunting, fishing and fur licenses which stamps or tags shall be securely attached to each fur, skin or pelt sold or offered for sale."

This makes it very clear that the person who catches the animal whose fur, skin or pelt is offered for sale must purchase and place the stamp or tag provided by Section 10 of Act No. 383, supra, on the fur, skin or pelt before the same is sold or offered for sale.

Therefore, it is my opinion that a fur dealer could not purchase these stamps or tags and place them on furs, skins or pelts which he buys from fur catchers, but the same must be bought and placed on the furs, skins or pelts before they are sold or offered for sale by the fur catcher himself who catches the animals whose furs, skins or pelts are sold or offered for sale.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 24, 1936.

Hon. I. T. Quinn,
Commissioner of Game, Fish & Seafoods,
Montgomery, Alabama.

License—Veterans Exemptions—A veteran, properly qualified, can claim the exemption to which he is entitled by Act No. 494, General Acts of 1935, p. 1057, approved September 13, 1935, when applying for a license levied by either Section 10 or Section 18 of Act No. 383, General Acts of 1935, p. 813 approved September 9, 1935, which are the sections levying license on fur catchers and fur dealers, respectively.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago, which follows:

"Section 10 of Act No. 383 of the 1935 Legislature approved September 9, 1935, levies a license on the catching of fur bearing animals.

"Section 18 of the above mentioned Act levies a license on any person, firm, association or corporation engaged in the business of buying, trading, selling or otherwise dealing in furs, etc.

"I would thank you to give your opinion as to whether or not a World War Veteran otherwise qualified, could claim the exemption provided by Act No. 494 of the 1935 legislature, approved September 13, 1935, when applying for a license levied by either of the above sections."

It is my opinion that a veteran, properly qualified, could claim the exemption to which he is entitled by Act No. 494, General Acts, 1935, page 1057, approved September 13, 1935, when applying for a license levied by either Section 10 or Section 18 of Act No. 383, General Acts of 1935, p. 813 approved September 9, 1935, which are the sections levying a license on fur catchers and fur dealers, respectively.

I call your attention to an opinion of this office to Hon. John B. Weaver, Judge of Probate, Double Springs, Alabama, under date of January 24, 1935, Office Edition, 2-A, page 2, holding that the Veterans License Exemption Act of July 2, 1931, was applicable to a trapper's license. I enclose a copy of this opinion for your information. The present Veterans Exemption Act is very similar to the Act referred to in this opinion and following the reasoning of this opinion, I conclude that the present Veterans Exemption Act is applicable to the licenses levied by Sections 10 and 18 of Act No. 383, supra, which are the sections which levy a license on fur catchers and fur dealers, respectively.

I call your attention, however, to the fact that a veteran could only claim an exemption from one of these licenses and not from both of them. See opinion of this office to Hon. A. L. Hastings, Judge of Probate, Marengo County, Linden, Alabama, under date of December 8, 1932, Office Edition, Reports of Attorney General, Vol. 12, page 244.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 24, 1936.

Hon. Theo. Hurt,
Clerk of Circuit Court,
Marion, Alabama.

1. When appellant makes a supersedeas bond and appeals his case to the Supreme Court and is there successful the supersedeas bond cannot be made liable for costs.

2. Section 7806, Code of Alabama of 1923 provides that where the plaintiff obtains judgment against the defendant for damages and costs and an execution for them is issued against defendant and returned "no property found" then the plaintiff becomes liable for the costs which accrued at his instance but this cannot be made to apply to the defendant where the statute only provides that it applies to the plaintiff.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 1, 1936, in which you request my opinion as follows:

"A brings suit against B in this Court and gets judgment. B appeals and gives supersedeas bond.

"The Supreme Court reverses and remands the case and in their certificate of reversal the Costs of appeal and in the Court below are taxed against the appellee.

"Execution is issued against the appellee, Mr. A and is returned "no property found".

"Can I as Clerk issue execution against B and his sureties on the supersedeas bond for the costs of appeal? Can I issue execution against B for the costs incurred by him in this Court?"

It is my judgment you cannot issue execution against B and the sureties on his supersedeas bond for the reason that when B was successful in his case in the Supreme Court the terms of the supersedeas bond become inoperative against B and his sureties. This is true in the case for two reasons: All the costs both in the Circuit Court below and on appeal are adjudged against A by the Court and hence B being successful in his appeal the supersedeas bond has served its purpose and becomes inoperative. The sureties on the bond are not liable beyond its terms and penalties. *Seaman v. White*, 8 Ala. 583. My answer to your second inquiry is in the negative. This office has held that the provisions of Section 7805 Code of Alabama of 1923 only apply to the plaintiff and cannot be made to apply to the defendant. This section is as follows:

"7805. WHEN AGAINST PLAINTIFF FOR HIS COSTS.—When execution against the defendant is returned "no property found" execution may issue against the plaintiff, in the name of the clerk or the register of the court, for all the costs created by him in obtaining his judgment."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 24, 1936.

Hon. J. W. Brock,
Clerk & Register,
Circuit Court,
Coffee County,
Enterprise, Alabama.

Trial Tax—Collectible in petition to remove disability of non-age but not collectible in petition for permission to remarry.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago which follows:

"Am writing for information concerning the collection of \$3.00 as trial tax in ex parte cases, such as removing disabilities of non-age and permission to re-marry."

"This question has come up for discussion and some seem to think it isn't legal to collect it."

It is my opinion that the trial tax should be charged in petitions to remove the disability of non-age. In an opinion of this office addressed to Hon. J. H. Hard, Jr., State Comptroller, Capitol, under date of October 16,

1933, Biennial Report, Attorney General, 1932-1934, at page 390, it was held that the trial tax is collectible in all original cases, civil, criminal, and equity which go upon the docket of the Circuit Court but that it is not collectible in purely ancillary cases which are part of, or grow out of, original cases. This is the opinion of this office on this subject. A petition to remove the disability of non-age is an original and not an ancillary case. Therefore, the trial tax should be collected in such a case.

As to whether or not the trial tax should be charged in a petition for permission to remarry I enclose a copy of the opinion of this office recently rendered to Mrs. Sally Johnson Roberts, Register, Circuit Court, Chilton County, Clanton, Alabama, holding that the trial tax is not collectible in a petition for permission to remarry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 27, 1936.

Hon. W. W. Ramsay,
Associate Member,
State Tax Commission,
Montgomery, Alabama.

License—Coal and coke dealers—

Under Schedule 36.2 of 1935 Revenue Act persons engaged in selling, distributing, or hauling or delivering coal or coke by truck or other vehicle, either as dealer, employee, agent, broker, sales agent or mining company who sells, or hauls, or delivers direct from mine or plant to consumer must pay the license therein levied in each county in which it sells, distributes, hauls and delivers coal or coke in this manner.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago which follows:

"Please advise as to liability of coal and coke dealers for licenses in counties other than home office under Schedule 36.2.

"The case in question is a trucker residing and buying coal in Winston County and selling and delivering in Lauderdale County. Is this man due a license in Lauderdale County?"

Schedule 36.2 of 1935 Revenue Act reads as follows:

"Each person, other than those qualifying under Section 1 of this Schedule, engaged in selling, distributing, or hauling, or delivering coal or coke by truck or other vehicle, whether as dealer, employee, agent, broker, sales agent or mining company, who sells, or hauls or delivers direct from mine or plant to consumer shall pay a privilege license on the first truck or other vehicle used in said business of fifteen dollars (\$15.00), and on each additional truck or vehicle \$3.00 but the provisions of this schedule shall not apply to persons whose inventory and sales are in quantities of not more than one ton, and in no event shall this license be issued for less than one year, such license to be in addition to the regular motor vehicle license. Each such person shall register each truck or other vehicle so used in such business in the county in the office

collecting and issuing license. When such trucks are registered and all license requirements complied with, a tag as above described shall be issued for each truck or other vehicle, and such tag shall at all times be displayed next to the regular license tag on all trucks or other vehicle in such business."

Sub-paragraph (a) of Section 350 of this Act provides:

"Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business, except as specifically otherwise provided."

While sub-paragraph (b) reads:

"There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

Therefore, it is my opinion that persons selling, distributing, hauling or delivering coal or coke by truck or other vehicle as dealer, employee, agent, broker, sales agent or mining company which sells, hauls or delivers direct from mine or plant to consumer must pay the State and County license by the above quoted provisions of the 1935 Revenue Act in each County in which they sell, distribute, haul and deliver coal or coke.

It is true that sub-paragraph (a), supra provides that there shall be collected both a State and County license for each place of business, and that persons engaged in the business of selling, distributing, hauling or delivering coal or coke in the manner described in Schedule 36.2, supra, do not have an **established** place of business. However, it is my opinion that they have a place of business in each County in which they operate in the manner described in Schedule 36.2, even though they have no **established** place of business in any County. See opinion to Hon. W. G. Little, Probate Judge, Sumter County, Livingston, Alabama, under date of November 29, 1935, Quarterly Report, Attorney General, Vol. 1, page 255.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 28, 1936

Hon. Roy Sanderson,
Judge of Probate,
Marion County,
Hamilton, Alabama.

Judge of Probate has no authority or legal right to issue warrant in accordance with the provisions of resolution of Commissioners Court under consideration even though Works Progress Administration might agree to request of Commissioners Court contained therein.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago in which you enclose a copy of motion which was passed by the Commissioners Court of your County and asking

my advice as to whether or not you, as Judge of Probate, have the authority and legal right to issue warrant in accordance therewith. The resolution follows:

The following resolution was introduced by Commissioner Pearce and seconded by Commissioner Nixon:

"Whereas the County is without funds to participate in relief work in Marion County under the supervision of the Department of Public Welfare of the State of Alabama; and, Whereas, it is the desire of Commissioners Court to participate in such relief to the extend of \$300.00 per month in order to secure the matching by the Department of Public Welfare in the ratio of 4 to 1; and,

"Whereas, the Works Progress Administration has engaged in the County and the State in a program of road building in which each participate one-third; and,

"Whereas, if the Works Progress Administration will agree thereto, upon condition that the Court of County Commissioners pay \$300.00 out of their gasoline fund to take care of such amount diverted from the Works Progress Administration program in Marion County.

"Now, therefore, be it resolved by the County Commissioners of Marion County, Alabama, that we now request the Works Progress Administration to divert to the use of the Public Welfare Department in Marion County the sum of Three Hundred Dollars (\$300.00) for the month of January, 1936, out of the money allocated to Marion County for the purpose of participating with Marion County and the State of Alabama in the road construction program and in the event the said Works Progress Administration agrees thereto, we, the Court of County Commissioners of Marion County, Alabama, agree to divert from the County gasoline tax fund an equal amount in such way as the Works Progress Administration may direct during the month of January, 1936, or the Court of County Commissioners of Marion County agree to take care of at least Three Hundred Dollars (\$300.00) of the obligation assumed on the part of the Works Progress Administration for work done in Marion County during the month of January, 1936."

A vote was had on said motion, which carried and it is so ordered.

In reply I wish to advise that it is my opinion that you, as Judge of Probate, do not have the authority or legal right to issue warrants in accordance with provisions of this resolution, since the Court of County Commissioners is without authority to expend the proceeds of the gasoline tax allocated to your County in such a manner.

Should the Works Progress Administration agree to appropriate to the Public Welfare Department of your County the sum of \$300.00 out of the money allocated by it to Marion County for the purpose of constructing roads therein, and then the County should reimburse the Works Progress Administration for this sum out of the gasoline tax allocated to Marion County, this would amount indirectly to a use of the gasoline tax fund of Marion County for the purpose of contributing to the support of the Public Welfare Department. There is no law giving a Court of County Commissioners the authority to do indirectly something which it has no authority to do directly.

In an opinion of this office to Hon. Frank M. Johnson, Judge of Probate, Winston County, Double Springs, Alabama, under date of October 3, 1935,

Quarterly Report, Attorney General, Vol. 1, page 6, it was held that a county governing body had no authority to appropriate funds from its share of the gasoline tax, levied and collected by the State and appropriated to the various counties, for the support of the Public Welfare Department of the County. I enclose a copy of this opinion for your information.

Since the Court of County Commissioners is without authority to directly appropriate gasoline tax funds to the support of Public Welfare Department of the County it necessarily follows that it is also without authority to indirectly appropriate the proceeds of the gasoline tax fund for this purpose. Since the resolution here under consideration exceeds the jurisdiction and authority of the Court of County Commissioners you are without authority or legal right to issue warrants in accordance therewith.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 28, 1936.

Hon. O. C. Maner,
Clerk, Court of Common Pleas,
Montgomery, Alabama.

Where defendant is committed to jail under more cases than one there should be a separate and distinct mittimus for each case and where there is not such mittimus only one guard fee can be charged.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 20, 1936, in which you request my opinion as follows:

"I respectfully request your opinion in the following matter:

"James Garrett was arrested by the State Highway Patrol for reckless driving. After his arrest the officers found that he also had improper brakes on the motor vehicle he was operating, and two cases were made against him. He was committed to the Montgomery County Jail on Saturday. The following Monday a warrant was sworn out against him in each case, and a commitment was issued by me to the jailer to hold him for reckless driving, but I marked on the commitment 'Two Cases'."

From the facts stated above there was only one mittimus issued to the Sheriff of Montgomery County. The fact that on this mittimus there was an endorsement which said "Two Cases", in my opinion, amounted to nothing. By it the Sheriff was not informed as to the nature of the charge contained in the second case nor the amount of bail returned nor was there any way for him to know whether or not the second case was bailable. There should have been two mittimuses if there were two cases. As it stands there was only one mittimus and only one guard fee can be charged, under Section 3641 Code of Alabama, 1923, where it says:

"For guarding each prisoner lawfully committed to jail in the following cases:

"In all felony cases whether convicted or not\$2.00
In all arrests under indictment whether convicted or not\$2.00
In all other cases where convictions follow arrests\$2.00"

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 28, 1936.

Hon. O. L. Andrews,
Clerk of Circuit Court,
10th Judicial Circuit,
Birmingham, Alabama.

Jurors—Compensation for jury service is limited to days actually engaged in official service as such.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago which follows:

"Last Friday night we held a clerk in our office until 10:30 o'clock for the purpose of paying off a jury which was expected to report at any minute. This clerk after being notified that the jury was being taken to a hotel for the night left the office. For some reason or other the jury remained in the jury room and came to an agreement, and was dismissed by the jury bailiff at eleven o'clock. There being no one in the office to pay them off they returned the next morning contending for an extra days pay."

It is not entirely clear to me from this statement of facts just when the jurors mentioned therein were officially discharged. Therefore, my answer will have to be conditional.

If these jurors reached an agreement, reported their verdict to the Court and, after so doing, were discharged by the Jury Bailiff upon an order of the Court at 11 o'clock, then they completed the services for which they were summoned as jurors on that day and would not be entitled to pay for the next day, even though it was necessary for them to return to your office the next morning to receive the compensation due them.

Section 3710 of the Code of Alabama of 1923, which is the section dealing with the compensation of jurors, provides that they shall receive so much per day for each days service. It is my opinion that "service" as referred to in this section means actual attendance upon the sessions of court in the performance of the duties for which they were summoned. If these jurors performed no such service on the day on which they returned to your office to receive the compensation due them, but only returned to get their compensation, then they would not be entitled to pay for that day.

Of course, if, when the jurors reached their agreement, the Judge was not present to receive the verdict and they had to return the next morning to report their verdict to the Court and were not officially discharged by the Court until after that time, then they would be entitled to pay for that day.

Jurors are entitled to pay for each day's service, the service ending at the time they are officially discharged by the court.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 28, 1936.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Licenses—The transfer of the license should be made simultaneously with the transfer of the business. If this is not done the purchaser is doing business without a license, is delinquent, and should be cited by the license inspector. The license inspector's citation fee of \$1.50 should be collected by the Probate Judge or Commissioner of Licenses, when the license is transferred.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of June 25, 1936, in which you state:

"House Bill 324, Revenue Section 358, Privilege Licenses are transferable.

"In case a business changes hands, must the transfer of the license be made immediately by the new purchaser? If the transfer is not made in a reasonable length of time, can he be cited by the License Inspector? If so, what fees would this office collect for the License Inspector?"

In my opinion, the transfer of the license should be made simultaneously with the transfer of the business. If this is not done the purchaser is doing business without a license, is delinquent, and should be cited by the license inspector. The license inspector's citation fee of \$1.50 should be collected by the Probate Judge or Commissioner of Licenses, when the license is transferred.

I wish to call your attention to parts of subsections (b) and (g) of Section 353 of the 1935 Revenue Act, which are as follows :

"(b) The Judge of Probate must in all cases in addition to the other penalties required to be collected by him, collect the citation fee, if any, due the License Inspector before issuing any license. * * *

"(g) * * * All citations to delinquents shall be served by any lawful officer, or by the License Inspector, or his deputy, who shall be allowed as a fee one dollar and fifty cents (\$1.50) for each citation served, to be taxed against the delinquent. * * *".

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 28, 1936.

Hon. M. E. Marlette, Clerk,
Circuit Court of Lowndes County,
Hayneville, Alabama.

Clerk of Circuit Court—Entitled only to fees provided by Acts of 1894-5, page 186 when acting as ex-officio clerk of Board of Revenue of Lowndes County.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 15, 1936 in which you request my opinion as follows:

"By virtue of section 5 of a Local Law for Lowndes County: see Acts of 1894-5, page 186 and following, I am Ex-Officio Clerk of the Board of Revenue of said County. This section provides '—he shall attend all their meetings; he shall keep in security all their papers and documents; all claims against said County may be filed with and sworn to before him, without cost to the affiant; and he shall keep such records of said claims, and of the disposition thereof, as well as perform other duties as clerk of said board, as are now, or which may be required of him by any law, or which the said board may require of him as their clerk. And he shall be paid for his services at the Quarterly meetings of said Board in a sum not to exceed a rate of One Hundred and Fifty Dollars per year, payable at the end of each quarter'—

"In view of the fact that the duties of the Clerk have increased enormously since the enactment of the above law, the Board of Revenue desires to increase, in some legal way, my compensation. Some months ago, they passed a resolution, appropriating additional pay out of the Gasoline Tax money, which resolution was framed under the direction of a very competent Examiner of Public Accounts.

"I have read with interest the opinion by Thomas E. Knight, Jr., to Judge Mitchell of Henry County which I find in a volume of O. A. G., Oct. 1, 1932 to Sept. 30th, 1934, page 232-3 in which you seem to hold that a Clerk may be employed and paid out of the Gasoline Tax Fund, but that such disbursement applies only to a clerk whose duties are exclusively confined to duties pertaining to the Gasoline Tax.

"I feel that I should have extra compensation, and all of the Board are of the same opinion, but, before collecting any additional money for my services, I wish to be sure that same will not be charged back to me or my sureties.

"Can the Board of Revenue give me extra compensation out of the Gasoline Fund?"

In reply, I advise you as follows:

Before anything can be charged and paid out of a County Treasury to any officer, he must be able to point to a statutory provision authorizing such fee and making it a charge against the County. Code Section 7255 provides as follows:

"The law of costs and fees must be held to be penal and no fee must be demanded or received except in cases expressly authorized by law."

Our Supreme Court in Drago's case, 172 Ala. 157, speaks as follows:

"The law of this state (however it may be in other jurisdictions) is long and well settled that counties are governmental agencies of the state, and that they are therefore chargeable with and liable for those claims and demands—and those only—which the law imposes upon them, or empowers them to contract for. No officer can charge the county with the payment of any claim due him, however meritorious or whatever benefit the county may derive therefrom, unless expressly or by necessary implication authorized by law.—Jack v. Moore, 66 Ala. 187; Posey v. Mobile, 50 Ala. 6; Barbour County v. Clark, 50 Ala. 418; Naftel v. Montgomery County, 127 Ala. 563, 367, 29 South. 29."

I find no provision of the law authorizing a charge or fee by the Clerk of the Circuit Court when acting as ex-officio clerk of the Board of Revenue of the County other than the provision of the Acts of 1894-5, Sec. 5, found at page 187.

I am therefore of the opinion that the Clerk of the Circuit Court may only receive such sums as are provided by the Act of 1894-5 when acting as ex-officio clerk of the Board of Revenue, and that, in the absence of some legislative provision to the contrary, his compensation may not be increased by the County Board of Revenue.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 28, 1936.

Hon. E. L. Hurst,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Taxation—Redemption

(1) Redemption as authorized by Section 291 of the 1935 Revenue Act is limited to cases where property was sold to the State prior to Jan. 1, 1935 and application for redemption is made within four years from date of sale.

(2) Under Sections 268 and 269 redemption may be made at any time before the title passes out of the State.

(3) Where redemption is made under Section 269 as amended by Acts 1935, p. 1113 interest must be collected.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of July 11, 1936, stating:

"Under Redemption of Lands sold to The State for taxes Section 291 of the 1935 Revenue Code a person has four years to redeem without interest or penalties:—The opinion I would like to have is, if lands sold on June 7, 1932 for 1931 taxes the time has elapsed, that is the four years are up, and there are several persons applied to Tax Commission

to buy this property on which the four years have elapsed, and they send me a notice to notify the person under whose name was sold that they have sixty days to redeem.

"The question is, if I have the right to redeem after the time has elapsed, and if so, should I charge interest on the redemption, or should the owner who has failed to apply for redemption within the four years redeem through this office or should he make application to the State Tax Commission.

"Would appreciate an early opinion on this matter as I have several persons whose time has elapsed that want to redeem, that is after some other person has made application to buy from state."

It would appear from your statement that the four year period for redemption under the installment payment plan as authorized by Section 291 of the 1935 Revenue Act has expired.

Quarterly Report, Attorney General, Vol. I, p. 207,
Quarterly Report, Attorney General, Vol. II, p. 205,
Quarterly Report, Attorney General, Vol. I, p. 331,
Quarterly Report, Attorney General, Vol. II, p. 249.

Answering the inquiries contained in the second paragraph of your letter, I advise:

Section 268 of the 1935 Revenue Act authorizes the redemption of real estate sold to the State for taxes "at any time before the title passes out of the State."

The original owner therefore has a right to redeem. Such redemption is made through your office and in the manner authorized by Section 269 as amended by Act No. 526, approved Sept. 14, 1935 (Acts 1935 p. 1113).

Your inquiry as to interest is specifically answered by subsection (c) of said Amended Act.

I enclose copy of opinion to Hon. Homer Mitchell, Probate Judge of Cullman County, for your information.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 28, 1936.

Hon. R. E. King,
Tax Collector,
Mobile County,
Mobile, Alabama.

Taxation—Tax Collectors—

The Tax Collector, under the provision of Section 178 of the 1935 Revenue Act authorizing him to report such persons as have been over-assessed or wrongfully assessed, is not empowered to reopen and revalue property, but only is authorized to report and have allowed amounts which by virtue of clerical errors are greater than the amount of taxes actually due.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of June 15, 1936, in which you state:

"Please refer to Section 178 of the Revenue Laws of Alabama, Regular Session of 1935, and advise the writer if anyone has the authority to make an adjustment on an assessment where positive proof is furnished that a mistake or over-assessment has been made.

"The matter in question is as follows:—

"The Wood Printing Co. had an assessment for the years 1931-1932-1933-1934 which the former Tax Collector failed to collect and from some authority, Mr. W. A. Roberts, State Tax Commission, Agent, adjusted for the years 1931-1932 and 1933, but claimed he had no authority to adjust for 1934 and 1935.

"Mr. Jesse Hogan, Attorney, who represents this concern contends that under the above Section, I have the authority to make a proper assessment, but I contend that the Tax Collector has no authority in the matter. Will appreciate it very much if you will give this your earliest attention."

Your letter calls for a construction of Section 178 of the 1935 Revenue Act and particularly the meaning to be given to the words "**over-assessed or wrongfully assessed**". This Section is as follows:

"Section 178. The tax collector shall in each year report on oath to the State Tax Commission at Montgomery, and to the court of county commissioners, or other court of like jurisdiction, at the June term thereof, a list on a form prescribed by the State Tax Commission, of the persons from whom the taxes assessed against them cannot be collected, with the amount of taxes, state and county assessed against each, which shall be termed 'list of insolvents', and a list of such persons as have been **overassessed or wrongfully assessed**, with the taxes, State and County assessed against each; which shall be termed 'list of errors in assessments', and any taxes which may be in litigation, in order that the same may be passed upon and determined by the court. The Tax Collector shall cause the said 'list of insolvents' to be published twice during the month of July following the submission thereof to the June Term of the Court of County Commissioners or other Court of like jurisdiction. Said publication shall be made in a daily newspaper printed and published in said County; if no such paper is published therein, then in a weekly newspaper published in said County; if there be neither a daily or weekly newspaper of any sort published in said County, then he shall post said 'list of insolvents' in the Court House and in three other conspicuous places in said County and keep said posting available for the public during the entire month of July. A failure to publish said list as here required shall constitute a misdemeanor." (Emphasis ours).

The same provision substantially appeared in the Code of Alabama 1923 (1929 Compilation, Section 221) and likewise appeared as Section 213 of the General Revenue Act of 1919.

I have made a careful investigation and have been unable to find any decision of the courts specifically passing on or construing this provision. The Section will, therefore, have to be construed along with the body of

the Revenue Laws of which it is a part so as to make it, if possible, a harmonious whole and so construed as not to render it contradictory and contrary to the other portions of the Revenue Laws.

The word "over-assessed" if interpreted absolutely literally might have the effect of setting up the Tax Collector as a sort of Appellate Court of final jurisdiction to pass on and change the valuations of property as made by the constituted authorities and give him the authority to change an assessment and revalue property even though the same had been finally passed on by all the assessing authorities including the Tax Assessor, the Board of Review, State Tax Commission and the Circuit and Supreme Courts of Alabama. Such a power can hardly be contemplated unless the same was specifically and clearly authorized. The Tax Collector is a clerical officer and, with the exception of a very limited authority in the matter of escapes, he is given no authority to assess and value property. His duties are clerical and administrative and not judicial.

The assessment of property is required to be made first by the Tax Assessor (Section 47). In this he is aided by the agents of the State Tax Commission (Section 48). Assessments made by the Assessor under certain conditions are reviewable by the Board of Review (Section 75). Appeals from assessments made by the Board of Review are authorized by Section 78 to be taken to the Circuit Court and from the Circuit Court to the Supreme Court.

In the matter of public utilities (Section 105 et seq.) and shares of stock (Section 13) assessments are made by the State Tax Commission, from which appeals may be made to the Circuit and Supreme Courts (Section 103).

This procedure contemplates finality in the matter of valuation leaving only the actual collection of taxes to be made by the Tax Collector.

The Tax Collector's duties are to be found in Sections 152 and 202, inclusive, and in addition he is required to collect the poll tax as provided by Sections 203-213, inclusive, and perform the duties with reference to the sale of land for taxes found in Article 8, Chapter 1, being Sections 214 et seq. With the exception of Section 189 with reference to escapes, all of the duties relate to the collection of taxes and no power of assessment and valuation is given to the Collector unless it can be said that the word "over-assessed" as found in Section 178 can carry such authority.

The matter of finality of assessments has been frequently before the Supreme Court of Alabama. In the case of *State v. Doster-Northington Drug Co.*, 196 Ala. 447, decided February 10, 1916, it was stated:

"If the state through its duly constituted officers has exercised the final power of assessment and valuation of property, the determination is in its nature judicial (citing); and, unless impeached for fraud or lack of jurisdiction, or reviewed by appellate authority, it is final * * *.

"The power of the County Tax Commissioner having been duly exercised and his findings concurred in by the taxpayer, the assessment became final after the expiration of the tax year. If the action of the County Tax Commissioner was final as to the taxpayer, it must, of necessity, have been of like binding force on the tax official.

"The fact that the assessment was of escape properties for five years would not differentiate it from any other assessment or from an escape assessment for any one year assessment. If the State Tax Commission

had the jurisdiction and authority to set aside this assessment on November 3, 1914, it would have like authority after the expiration of the tax year and before the payment of taxes on the given assessment to set aside any assessment made by taxpayer in the preceding year. It could not be said with reason that such power was conferred on the State Tax Commission as to all taxpayers who had not paid their taxes on October 1st, but not as to taxpayers who had paid their taxes on or before that date or before the date of the attempted revaluation. If this were the rule, owners and purchasers of property would be subjected to inconvenience, uncertainty, and changing financial obligation to the state and county.

"The reasonable construction of the power of assessment of taxes, and of the review thereof, should be to the end that a stable and uniform system prevail in the state; and so, when annulment or review is not sought within the period of the tax year, that matured assessments shall be binding alike on the taxpayer and on the taxing authorities." (Emphasis ours).

This case, as pointed out, was prior to the Revenue Act of 1919. However, the Supreme Court has followed it with uniformity.

I call your attention to *State ex rel. Tallapoosa County vs. Butler*, 227 Ala. 212, 149 So. 260, decided June 8, 1933, Rehearing denied June 29, 1933, in which the Court said, *inter alia*:

"In *State v. Doster-Northington Drug Co.* 196 Ala. 447, 71 So. 427, it was declared: 'Notwithstanding the right of general and complete supervision is given to the State Tax Commission by Section 2223, Code of 1907, yet, in view of the provision of Section 2260, Code of 1907, and the other statutes, the power of the State Tax Commission to set aside valuations and assessments must be exercised before the end of the current tax year.'"

In *State v. Mortgage Bond Company*, 224 Ala. 406, 140 So. 365, decided January 14, 1932, rehearing denied March 31, 1932, the Court said:

"It is a principle of taxation that where the State has once proceeded by its duly constituted agencies to the assessment and valuation of property, the determination is judicial in its nature and conclusive in result unless impeached for fraud or want of jurisdiction or reversed and set aside by some Tribunal having authority to review (citing cases, including *State v. Doster-Northington Drug Co.*)"

To the same effect is the following quotation from *Union Bank & Trust Co. v. Phelps*, 228 Ala. 236, 153 So. 644:

"When the state through its duly constituted officers exercised the final power of assessment and valuation of appellant's property, the determination was in its nature judicial, and, unless this final determination was impeached for fraud or lack of jurisdiction, or reviewed by appellate authority, it was and is final, fixing the amount of the liability of appellant for said tax, and this liability as so ascertained and fixed became due and payable on October 1st, 1932. *State Tax Commission v. Bailey et al.*, 179 Ala. 620, 60 So. 913; *Anniston City Land Co. v. State*, 185 Ala. 482, 487, 64 So. 110; 37 Cyc. 1071; *State v. Doster-Northington Drug Co.*, supra; *State ex rel. Tallapoosa County v. Butler*, *State Tax Com'r.*, 227 Ala. 212, 149 So. 101."

The *Doster-Northington* case was likewise cited approvingly in *Gay v. State*, 228 Ala. 253, 153 So. 767.

To like effect is the following quotation from *State v. Birmingham Trust & Savings Co.*, 230 Ala. 556, 161 So. 793:

"We think the statute clear and complete; we see no occasion for protracted argumentation as to its meaning. It looks to a separate and final assessment of the shares, fixing of record the tax values thereof, with the sum due to be paid by the several owners, which for convenience is paid in one sum by the Bank on their behalf. It is this completed assessment roll which construes the judgment upon which the collection of the tax is authorized (citing *State v. Doster-Northington Drug Co.*)"

All of these cases have been decided since the Act of 1919 and the Code of 1923, which include the word "over-assessed" in the same manner it appears in Section 178 of the 1935 Act. And yet, in all of them, do we find the Court holding that once an assessment becomes final, it is binding on both the State and the taxpayer after the end of the tax year.

The reasoning above quoted from the *Doster-Northington* case pointing out that if the Tax Commission had the power to review an assessment after the end of the tax year, it might be in the inconsistent position of reopening cases in which the taxes had not been paid while it did not disturb those in which the taxes happened to have been paid is particularly applicable to the suggestion that the Tax Collector may exercise judicial functions and review the valuation in cases where he thinks there has been an over-assessment (in the sense of over valuation) of property. It is particularly true as to the Tax Collector because the Section in which this word is included is that which provides at the end of the tax collection year for the Tax Collector to secure certain allowances by reasons of insolvency, taxes in litigation, etc. He, therefore, apparently would be in the position of reviewing all unpaid assessments while not disturbing those which happened to have been paid and this, notwithstanding the fact that the tax assessment year had long since closed and at the time of making his report the delinquent date for the payment of taxes had long since passed.

Reading this provision along with the other body of the law and the holding of the Court that an assessment once made final is binding both on the State and the taxpayer, I am of the opinion that the word "over-assessed" cannot be construed so as to authorize the Tax Collector to re-value property which has been valued and assessed by the proper authorities and the tax year has closed. In fact, except in the matter of escapes, as pointed out, I find no authority for the Tax Collector to assess and value property whatever. To give such a meaning to the word "over-assessed" would render practically nugatory other provisions of the law for the final assessment and valuation of property which are set out in detail and in extenso and construing which our Supreme Court has said makes a final and binding assessment both on the State and on the taxpayer.

The problem thus confronts us as to giving a proper and reasonable meaning to the word "over-assessed" as used in Section 178. It is to be noted that this word is included in the Section providing for the report by the Tax Collector to the State Tax Commission and to the Court of County Commissioners the following items:

1. The "list of insolvents".

2. A "list of such persons as have been over-assessed or wrongfully assessed, which is termed 'list of errors and assessments'", and

3. "Taxes in litigation".

Following Section 178 is Section 179 authorizing the Court of County Commissioners "to examine such list and ascertain * * * what taxes contained in the list of errors and assessments should not have been collected by him by reason of such errors." From reading the whole of these two Sections, it is clear I think that the words "over-assessed" or "wrongfully assessed" are used in practically the same sense and that the only error or errors which the Tax Collector would be authorized to correct are those of a clerical nature. If the rate of taxation was \$2.00 per \$100.00 and the Assessor had erroneously calculated it at \$2.25 per \$100.00 such an error would be clerical and the Tax Collector would be authorized to secure allowance for the excess. Likewise if multiplying the valuation by the correct rate the result was an amount in excess of that properly due, the Tax Collector would be authorized to have an allowance for the excess over the correct amount. There might be a possible case where the Assessor included property not in existence and which fact affirmatively was shown on his records, thus making a greater amount of taxes due than were legally payable. In such cases, however, the error must be clerical and not judicial in order for the Tax Collector to secure any allowance therefor.

I conclude, therefore, that the word "over-assessed" as used in Section 178 does not authorize the Tax Collector to revalue property but merely authorizes the correction and allowance for clerical errors by which the amount of taxes shown to be due is greater than are legally payable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 30, 1936.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Licenses—When License Inspector has cited person, describing motor number and car, to buy license, and said person sells the car to another person without purchasing license and the second owner applies for a license, he should be required to pay the penalty provided by Sub-section (c) of Section 353 of the 1935 Revenue Act and citation fee provided by Sub-section (g) of Section 353 of the 1935 Revenue Act by virtue of the citation issued to the first owner thereof.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago which follows:

"Under Section 353, General Acts of Alabama page 559 subdivision (b) please advise me if License Inspector has cited a certain person describing motor number and car to buy license and said person sells the car to another person without purchasing tag and the second owner applies for a license should he be required to pay the penalty and citation fee by virtue of citation issued to first owner."

Sub-section (a) of Section 353 of the 1935 Revenue Act reads as follows:

"If the License Inspector shall discover any motor vehicle being operated without a proper or legal license, he shall cite the operator of the motor vehicle, and in filing copy of such citation with the Probate Judge he shall show on such citation the particular motor vehicle operated without legal license, as well as the operator thereof."

and sub-section (b) of Section 353, supra, reads, in part, as follows:

"The Judge of Probate must in all cases in addition to the other penalties required to be collected by him collect the citation fee, if any, due the License Inspector before issuing any license, and in cases of motor vehicle where a license is taken out in the name of person not cited the citation fee shall be collected if citation filed shows motor number of such vehicle.* * *."

The above quoted provisions of the 1935 Revenue Act are very clear to the effect that the Judge of Probate must collect all penalties and citation fee, if any, that may be due before he can issue any license for a motor vehicle whether the license is taken out in the name of the person cited or not, provided the citation filed shows the motor number of such vehicle.

Therefore, it is my opinion that when a License Inspector has cited a person describing motor number and car to buy license and said person sells the car to another person without purchasing license and the second owner applies for license he should be required to pay the penalty provided by Sub-section (c) of Section 353 of the 1935 Revenue Act and citation fee provided by Sub-section (g) of Section 353 of 1935 Revenue Act by virtue of the citation issued to the first owner.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 31, 1936.

Hon. Chas W. Lee,
State Comptroller,
Capitol.

Where defendant is convicted for petit larceny and sentenced to hard labor to cover the fine, and an additional term at hard labor for punishment, but the Court through inadvertence or neglect fails to sentence the defendant for costs the State is not liable for same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 25, 1936, in which you request my opinion as follows:

"Section 4908 of the Code of 1923 makes a hard labor sentence in petit larceny cases mandatory and fine in addition at the discretion of the Court.

"In a petit larceny case tried in County Courts under affidavit and warrant and sentenced to one year hard labor for the county, could the State legally pay the costs, no additional sentence for costs being imposed?"

My answer to your first inquiry is in the negative. Petit larceny under all conditions is a misdemeanor and the defendant can only be sentenced to hard labor or imprisonment in the county jail when convicted of this offense. Such sentence should be to serve so many days to pay the fine and an additional term to satisfy the hard labor sentence if hard labor sentence is imposed, and then an additional number of days to pay the costs. All sentences for petit larceny should and must as a matter of law carry the costs, and when the court refuses or neglects to sentence for costs the State is without authority to pay such costs for the reason that through the neglect or inadvertence of the trial judge in sentencing the defendant for costs the State does not get the benefit of the convict's labor for the same, and it would be without reason to say the State must pay something for nothing. Before there is any obligation on the part of the State to pay such costs, there must be a sentence to hard labor covering same.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 31, 1936.

Hon. I. T. Quinn,
Alabama Oyster Commission,
Capitol.

Game and Fish—

1. Under Acts 1935, page 618 the Alabama Oyster Commission held empowered to extend the closed season on commercial salt water shrimp for a period additional to that provided by Act of 1919, page 252, as amended by Act of 1931, page 424.

2. Oyster Commission held authorized under police power, and powers granted in 1935 Acts, p. 618, to make any reasonable rules and regulations governing taking of salt water shrimp, when in the opinion of the Commission, such rules and regulations are necessary for the protection of shrimp life and the encouragement of the industry.

Opinion by Assistant Attorney General Small.

Dear Sir:

Under date of July 7, 1936, you request my opinion as follows:

"Section Three (3) of an Act approved September 2, 1919, provides, 'That it shall be unlawful for any person, firm or corporation to catch, or attempt to catch, any salt water shrimp between the 1st day of June and the 1st day of August of each year'

"Section Nine (9) of an Act of the Legislature approved July 17, 1935, commonly referred to as the Oyster Commission Act, provides as follows:—"The Commission when incorporated shall be vested with all powers necessary or requisite for the accomplishment of its corporate purpose and capable of being delegated by the Legislature of the State of Alabama; and no enumeration of particular powers hereby granted shall be construed to impair any general grant of power herein contained, nor to limit any such grant to a power or powers of the same class or classes as those so enumerated."

"The Supreme Court of Alabama by its decision on May 14, 1936, held the Oyster Commission Act to be constitutional. In this decision Justice Bouldin held that 'The power and duty of the State to protect the paramount interests of the public by regulations prescribing the manner of taking oysters from the waters, and to this end, prohibiting the taking of oysters by dredging or other method depleting the oyster supply is clear, and not subject to reasonable debate.'

"The same decision is as applicable to shrimp as to oysters.

"The Alabama Oyster Commission requests an opinion from you as to whether it has the authority to extend or further close the season so as to open the season on commercial salt water shrimp approximately ten (10) days after the closed season as provided in the 1919 Act referred to supra.

"Request is also made by the Commission as to whether or not the Alabama Oyster Commission may by regulation prohibit the use of seines, nets, or other devices for taking shrimp when in its opinion for the better protection and development of the industry it is deemed necessary to do so.

"Permit me to respectfully call your attention to the fact that no statute in existence sets a specific date for the open season on salt water shrimp.

"The Commission expects to hold a meeting during the week of July 12, 1936. It will be greatly appreciated, therefore, if the Commission could have the benefit of your opinion by the time of its meeting."

Your request calls for a determination of the intent of the Legislature as expressed by Act No. 226, approved July 17, 1935, Acts 1935, page 618. This Act creates the Alabama Oyster Commission, provides for its organization and defines its powers.

The Sections particularly pertinent to your inquiry are Sections 8, 9 and subdivisions (5) and (10) of Section 10, which are as follows:

"Section 8. The corporate purpose of the Commission is to encourage and promote the fullest possible use and development of the oyster industry within the jurisdiction of the State of Alabama and to preserve the oyster life in the public waters of this State, and to increase and improve the supply thereof, and to prevent undue or unnecessary depletion thereof.

"Section 9. The Commission when incorporated shall be vested with all powers necessary or requisite for the accomplishment of its corporate purpose and capable of being delegated by the Legislature of the State of Alabama; and no enumeration of particular powers hereby granted shall be construed to impair any general grant of power herein contained, nor to limit any such grant to a power or powers of the same class or classes as those so enumerated.

"Section 10. (5) To exercise all the power and authority now conferred on the Commissioner of Game and Fisheries, Commissioner of Conservation, Chief Oyster Inspector or other official under Chapter 47, Code of Alabama, 1923 (Sections 2724-2777) and by any other provisions of law now existing or hereafter adopted which relate to oysters or shrimp in the waters of the State of Alabama * * *

(10) To do any and all acts and things herein authorized or necessary or convenient to carry out the powers expressly given in this Act under, through or by means of its own officers, agents and employees, or by contracts with any person, federal agency or municipality."

The constitutionality of this Act was passed on by the Supreme Court in *Skrmetta v. Alabama Oyster Commission*, 168 So. p. 168 (Advance Sheets No. 2). In that case the Supreme Court after quoting the foregoing Sections 8, 9 and subdivision (5) of Section 10, stated:

"Among the powers thus transferred from the Commissioner of Conservation to the Alabama Oyster Commission is that conferred by Code 2754, reading: 'The Commissioner of Conservation may make such regulations and rules not inconsistent with the provisions of this chapter, to the end that the oysters of the State may be adequately protected and the industry encouraged'."

After discussing the particular resolution of the Commission and the underlying powers of the State, the Court specifically said:

"(3) Sections 8 and 9 of the act, with or without the aid of section 2754, clearly empower the commission to exercise all powers which can be conferred, namely, regulative powers, to preserve the oyster life, increase and improve the supply thereof, and to prevent undue depletion thereof. This, we think, clearly enough defines the purpose and scope of regulative power, and includes the power to regulate the manner of taking oysters, which, in turn, includes prohibition of dredging as one of the means to the end defined by law. The reason for creating such agencies is that effective regulations must come from a body in contact with and fully informed of the problem and the best manner of dealing with it.

"(4) That the act does not specifically refer to dredging as one of the matters demanding regulation is of no more concern than any other regulation the commission may deem proper to accomplish the purposes specified in the act. The logic of appellant's position is that general regulative powers to accomplish defined purposes cannot be granted, but the Legislature must inform itself and specify the particular lines of regulation to be followed. This is out of line with decisions, here and elsewhere, upholding regulatory powers conferred in general terms, for well-defined purposes named in the law. The entire subject-matter here involved concerns the conservation of state properties through a state agency, protection of a source of food supply, owned by the State, and the oyster industry growing out of same. We conclude the regulation challenged was and is valid." (Citing Authorities).

It appears that the foregoing quotation from the Court's opinion practically answers your inquiry. The conclusions of the two quoted paragraphs emphasize the reason for the Court's decision, which notwithstanding the burden of repetition we again quote:

"The reason for creating such agencies is that effective regulations must come from a body in contact with and fully informed of the problem and the best manner of dealing with it * * *."

"The entire subject-matter here involved concerns the conservation of State properties through a state agency, protection of a source

of food supply owned by the State and the oyster industry growing out of the same."

By the title of the Act and subsection (5) of Section 10, it appears that the Act applies as fully to the shrimp industry as it does to the oyster industry.

This being true, it is my conclusion that the 1935 Act is not in conflict with the Act of 1919, page 252 as amended by the Act of 1931, page 424, but that it is an additional grant of power to the Commission and if the Commission in pursuance to the major purpose of the Act, as expressed in Section 8 and as construed by the Supreme Court, should desire to make a regulation extending the closed season on commercial salt water shrimp in the public waters of the State the Act of 1935 so empowers it. Of course, it is needless to remark that such regulation should be reasonable and not arbitrary and should be for the purpose of the better protection and development of the industry in accordance with the declared purposes of the Legislature.

In reply to your second question, I wish to advise that in my opinion, the Alabama Oyster Commission may by reasonable regulations prohibit the use of seines or other devices, except cast nets (See Acts 1931, p. 424, Section 3, expressly excepting cast nets) for taking shrimp when in its opinion, for the better protection and development of the industry, it is deemed necessary to do so.

See also the case of *People v. Fish*, 34 N. Y. S. 1013.

This, in my opinion, is a regulatory power conferred upon the Oyster Commission by the Acts of 1935, page 618 and defined by Honorable Justice Bouldin in the case of *Skrmetta v. Alabama Oyster Commission*, supra. I wish to further refer you to the case of *Railroad Commission of Alabama v. Northern Alabama Ry. Co.* 62 So. 749, 182 Ala. 357, in which the Court said:

"The legislature can delegate the execution of laws to public officials giving them some latitude in their execution, without amounting to the delegation of legislative authority."

See also *State v. Atlantic Coast Line Ry. Co.* 47 So. 969, 32 L. R. A. (ns) 639 and the case of *Downs v. Swann*, 73 A. 653, 23 L. R. A. (ns) 729, 14 Am. St. Rep. 486 in which the court stated the rule as follows:

"The State may delegate a police power to subordinate boards and commissions, and a reasonable and just exercise by them of the delegated power will be upheld."

The foregoing opinion is limited to the particular requests here presented. Nothing herein is to be construed as holding that any other regulation or regulations which might be passed by the Oyster Commission would be proper, since as other regulation or regulations, other than the two presented in the request for this opinion, are now before this office.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 3, 1936.

Hon. Henry Naish,
Treasurer of Shelby County,
Columbiana, Alabama.

Counties—may pay for furnishing right of way for State road out of General Fund although a county has reached its constitutional debt limit.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of July 29, 1936, which is as follows:

"The State Highway Department of Alabama is engaged in widening, improving and resurfacing the Montgomery Birmingham Highway through Shelby County and requires said County to furnish rights of way for such improvements.

"Shelby County is above its constitutional debt limit as revealed by recent report of State examiners.

"Under the status of the County's indebtedness aforementioned, I will be glad to have you advise me if the County may pay for these rights of way out of its General Fund."

I am of the opinion that your inquiry should be answered in the affirmative.

In dealing with the question of the payment of obligations by a county which had reached its constitutional debt limit our Supreme Court in the case of *Brown v. Gay-Padgett Hdw. Co.*, 188 Ala. 423, 66 So. 161 stated as follows:

"* * * Legitimate county debts or obligations are of two classes: (1) Those which are prescribed and imposed by law, and are purely involuntary as to the county; (2) those which are merely authorized by law, and are assumed by the county with some measure of discretion, at least as to time and amount.

"Section 153 of the Code makes a number of specified county obligations preferred claims against the general treasury, and requires the treasurer to set aside sufficient funds for their payment. We think also that, by necessary implication, whenever the assessed revenues of an overburdened county are not sufficient for the payment of all current county obligations, those involuntary obligations which are fixed and imposed by law must be regarded as preferred claims of a second class, which are entitled to precedence over the general and voluntary obligations of the county.

"As a result of the foregoing considerations, we hold that a county which is indebted up to the constitutional limit may nevertheless appropriate its anticipated revenues actually assessed for the payment of its ordinary current obligations incurred during and for the year for which such revenues are assessed and payable; that the obligations absolutely fixed by law are preferred claims; and that all voluntary obligations assumed or incurred after the exhaustion of the full amount of revenues on

hand or in valid expectancy are debts which are repugnant to the Constitution and are therefore invalid as to their payment."

"We think it is clear, also, that such a county cannot borrow money even to provide funds for current and necessary municipal expenses.
* * *"

The question then presents itself as to whether or not the furnishing of the right of way in question by the county is a voluntary or an involuntary obligation.

Section 31 of the Highway Act of 1927 (General Acts, 1927 p. 358) provides as follows:

"Section 31. (1331) RIGHT OF WAY FOR ROADS; HOW ACQUIRED. The right of way deemed necessary by the State Highway Department for a road or bridge constructed under the provisions of this article shall be acquired by the County in which such road is to be located, without expense to the State. Should the county fail or refuse to acquire the necessary right of way, the State through the State Highway Department shall have authority at the expense of the county to acquire such right of way, either by purchase or by the exercise of the right to eminent domain in condemnation proceedings, as is provided for under the laws of this State."

This section places upon the county the duty to acquire the right of way.—**Mobile County v. Barnes-Creary Supply Co.**, 225 Ala. 127, 142 So. 72. Such, in my opinion, is an obligation prescribed and imposed upon the county by law and is purely involuntary as to the county. Therefore, same may be paid by the county out of its General Fund, although it has reached its constitutional debt limit, from anticipated revenues under the rules set out in the case of *Brown v. Gay-Padgett Hdw. Co.* supra.

In this connection I also wish to refer you to an opinion of this office found in Quarterly Report of Attorney General, Vol. II, p. 82, which holds that the cost of furnishing rights of way by a county may be paid from the Road and Bridge Fund or from the Gasoline Fund.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 4, 1936.

Hon. Eugene H. Hawkins,
Judge of Probate
Jefferson County,
Birmingham, Alabama.

Municipal Elections—

1. The term "municipal office" as used in Act No. 424, General Acts 1935, page 894, approved September 13, 1935 which is commonly known as the Kirby Election Act applies to offices of cities and towns.

2. Said Act held to apply to municipal elections held at a time other than statewide general elections.

3. Said Act held to have no application to municipal elections held in years in which no state-wide primary election is held.

4. The provision of said Act requiring candidates for municipal office nominated by petition of electors to file their petitions and their declaration of candidacy prior to the first Tuesday in May of the year in which a state-wide primary election is held to be directory and failure to comply with same held not to prohibit proper officer from causing name of such candidate to be printed on the ballot.

5. Candidates for town and city offices should file with the Mayor or other like official of the city or town and not with the Judge of Probate of the county in which the city or town is located.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I am in receipt of your letter of recent date making several inquiries concerning Act No. 424, General Acts 1935, page 894, approved September 13, 1935, which is commonly known as the Kirby Election Act. I have also received letters from a number of other officials making inquiries in regard to this Act. I shall here attempt to answer all inquiries in this regard that have been propounded to this office to date.

The following inquiries have been made:

1. Is Act No. 424, supra, constitutional?
2. Does the term "municipal office" as used in said Act apply to offices of cities and towns or to offices of political sub-divisions of the county?
3. Does said Act apply to municipal elections held at a time other than state-wide general elections?
4. Does said Act have any application to municipal elections held in a year in which no state-wide primary election is held?
5. What effect, if any, does the last sentence of said Act have on the rest of the Act with reference to municipal elections, inasmuch as "municipal" is left out of said last sentence?
6. Should candidates for town and city offices file their petitions with the Judge of Probate for the county in which the city or town is located or should the same be filed with the Mayor or other like official of the city or town?

First, I wish to call your attention to an opinion of this office addressed to Hon. Howell Turner, Secretary of State, Capitol, under date of June 18, 1936, which is the only opinion heretofore rendered by this office on Act No. 424, supra. This opinion held:

"In my opinion, Acts 1935, page 894 (which is a substitute for Code of 1923, Section 462, as amended by Acts 1935, page 237) is reasonably clear and workable. By the last enactment, the Legislature evidently intended to lay down a different rule to govern each of the two classes of nominees dealt with, namely (1) those nominated as candidates for county or municipal offices by the caucus, convention, primary election, etc. of a political party; and (2) those nominated as candidates for any office, Federal, State, District, County or Municipal by a petition of electors. This latter class is commonly understood in Alabama to mean 'independent candidates'. Of course, as to candidates for Federal, State or

District offices nominated by party machinery, certification to the Secretary of State is governed by Section 647 and certification by that official to the several Probate Judges is governed by Section 648 of the Code of 1923.

"The last Act simply provides that, as to those nominated for county or municipal offices, by party machinery, certificate of nomination shall be filed not more than sixty days nor less than twenty days prior to the **general** election; whereas, as to those nominated for any offices, whether Federal, State, County etc. by petition of electors (so-called 'independents') the petition shall be filed and the candidate shall file his declaration of candidacy prior to the date of the primary election."

This opinion represents the studied judgment of this office and is adhered to. However, where the words "prior to the date of the primary election" are used in the last sentence thereof, there should appear instead the words "prior to the first Tuesday in May in the year in which a state-wide primary election is held." These words are hereby substituted for the above referred to words used in the opinion and the opinion is hereby corrected in this regard.

I shall now deal with the various inquiries in seriatim:

The first inquiry, in regard to the constitutionality of said Act, is laid in very general terms. This office, taking a cue from the Courts, undertakes to pass upon the constitutional validity of a statute only when the request is clearly presented and then only as to the constitutional objections urged against it. Since you urge no particular objections against the constitutionality of this Act, its constitutionality will not be here considered, and I will assume that the Act is constitutional for the purpose of answering the other inquiries made. If you care to present particular objections as to the constitutionality of this Act, this office will be glad to consider the same.

In answer to the second inquiry, it is my opinion that the term "municipal office" as used in said Act applies to offices of cities and towns. The term "municipal" is repeatedly used in the laws of this state dealing with cities and towns, so often that when it appears in a statute it is presumed to refer to cities and towns unless the contrary clearly appears. Such is not the case here, and it is my opinion that the term was here used in the same sense that it is repeatedly used in the other laws of this State relating to cities and towns, and that is was the plain and clearly expressed intention of the Legislature that this Act should apply to offices of cities and towns just as it applies to Federal, State and County offices. It is very true that a county and the various subdivisions thereof are municipal corporations in the broadest sense. This fact has been kept in mind, but, nevertheless, it is my opinion, as stated above, that the term "municipal" is here used in the same sense in which it is repeatedly used in our laws dealing with cities and towns. I therefore hold that the term "municipal office" as used in said Act applies to offices of cities and towns.

The third inquiry must be answered in the affirmative. Act No. 516, General Acts 1935, page 1105, approved September 14, 1935, provides that all regular municipal elections in cities and towns should be held on the third Monday in September, 1936, and quadrennially thereafter. Thus it may be seen that all regular municipal elections under the general law are held at a different time from the state-wide general election for Federal, State, District and County offices, which is held on the first Tues-

day after the first Monday in November of the even numbered years. If this Act only applied to municipal elections held at the time of the state-wide general election in November of the even numbered years it would not apply to any regular municipal elections held under the general laws. Such, in my opinion, was not the intention of the Legislature. Rather, it seems clear to me that the Act was intended to apply to all regular municipal elections held under the provisions of the general law, even though said elections are held at a different date from that on which the state-wide general election for Federal, State, District and County offices is held.

My answer to the fourth inquiry is in the negative. As pointed out in my answer to your third inquiry, all regular municipal elections for cities and towns under the general law are held on the third Monday in September, 1936, and quadrennially thereafter and consequently are held in years in which state-wide primary elections are held, such state-wide primary elections being held in all even numbered years. Municipal elections held in years in which there is no state-wide primary election are held under special or local laws and are to be governed by the provisions of the same and not by the provisions of the general laws on the subject such as this Act. It is obvious that the Act here under consideration was not intended to apply to municipal elections held in years in which no state-wide primary election is held since the provisions of the Act in regard to filing all petitions and declarations of candidacy by candidates nominated by petition relate to the first Tuesday in May in the years in which state-wide primary elections are held, the first Tuesday in May being the time of the holding of the first statewide primary election in every even numbered year. This provision could not be effective in years in which no state-wide primary election is held.

As to the fifth inquiry, I wish first to call attention again to the opinion of this office to the Secretary of State, *supra*, which held that, as to those candidates nominated for municipal office by party machinery, certificates of nomination should be filed not more than sixty days nor less than twenty days prior to the general election; whereas, as to those nominated by petition of electors, the petition should be filed and the candidate should file his declaration of candidacy prior to the first Tuesday in May in the year in which a state-wide primary election is held. So, in strict compliance with the provisions of this Act, all candidates for municipal office who are nominated by petition of electors should file their petitions and declarations of candidacy by the time stated in the Act. But, it is my opinion that the failure of a candidate for municipal office nominated by petition to comply with these provisions of said Act would not keep the proper officer from causing his name to be printed on the ballot to be used in the municipal election in which he is a candidate. I call your attention to the fact that nowhere in this Act is there any inhibition against the proper officer causing the name of a candidate for a municipal office nominated by petition to be placed on the ballot, merely because of his failure to file his petition or declaration of candidacy within the time stated in the Act. The proviso which prohibits the Judge of Probate from causing the name of an independent candidate for state, county or federal office to be printed on the ballot unless he has filed his declaration to become such a candidate within the time stated in the Act does not include candidates for municipal office. At every other place in the Act "municipal" is used along with federal, state and county and the failure to so include it in this proviso shows a clear intention on the part of the Legislature that this provision should not apply to such candidates for municipal offices. The inclusion of some operates

to the exclusion of all others. Therefore, it is my opinion, and I so hold, that the proper officer is not prohibited from causing the name of a candidate for municipal office nominated by petition of electors to be printed on the ballot, even though such candidate fails to file his petition and declaration of candidacy by the time set out in the Act. To me, the fact that the Legislature saw fit to place a penalty on all such candidates for Federal, State and County offices who did not comply with these provisions and did not place such a penalty on such candidates for municipal offices clearly shows that it did not intend for this penalty to attach to such candidates for municipal office. Therefore, I hold that the provisions in the Act in regard to candidates nominated by petition filing their petitions and declarations of candidacy by a certain date are **directory** only, insofar as they apply to such candidates for **municipal** office, and that, while in strict compliance with the law, all provisions should be followed by all such candidates for any office, yet the failure of such candidates for municipal office to so comply with them, does not prohibit the proper officer from causing their names to be printed on the ballot to be used in the election in which they are candidates.

In answer to the sixth inquiry it is my opinion that candidates for municipal offices should file with the Mayor or other like official of the city or town in which they are candidates and not with the Judge of Probate of the County in which such city or town is located. Section 485 of the Code of Alabama 1923 reads:

"485. MUNICIPAL ELECTIONS; HOW PROVIDED FOR.—In case of any municipal election held at a time different from a general state or federal election, the duties herein prescribed for the judge of probate in respect to receiving nominations, printing and distributing ballots and cards of instructions shall be discharged under the same sanctions by the mayor or other chief executive officer of the city or town."

Therefore, all candidates in municipal elections held at a time different from a general State or Federal election (and all regular municipal elections are held at a different time) should file with the Mayor or other like official of the city or town in which they are candidates and not with the Judge of Probate of the county in which the city or town is located.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 5, 1936.

Hon. Robert S. Duck,
Register and Clerk of
the Circuit Court,
Baldwin County,
Bay Minette, Alabama.

Where defendant is convicted in County Court and pays in cash, confesses judgment or is sentenced to hard labor, whenever this cost is collected it should be paid by you to the witnesses testifying in this individual case. All fines and forfeitures go into the County Treasury, are credited to the Fine and Forfeiture Fund and are used to pay officers costs and witness claims where the State has failed or the case not pressed or the defendant has been convicted and execution returned "no property found" the witness claims should be paid according to registration.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 21, 1936, in which you request my opinion as follows:

"Would you please give me an opinion on the following:

"In County Court there are several witnesses who made their appearance in more than one case on the same day. Would they be entitled to their witness fees in every case in which they were subpoenaed or served? In the event that the Convict Department did not pay this, and they do not, except in one case, would the other fees be a proper charge against the Fine and Forfeiture Fund?

"The Fine and Forfeiture Fund of this County is in arrears, and in collecting witness fees, should I turn all fees over to the County Treasurer to be paid out by him on the oldest registered claims against the Fine and Forfeiture Fund, or should they be paid direct by my office to the various witnesses?"

Answering your first request I call your attention to an opinion of this office written October 3, 1927, to Hon. W. H. Shaw, Deputy, Solicitor, Tusculumbia, Biennial Report of Attorney General, 1926-1928, page 306. This opinion answers this portion of your request fully.

Answering your second request I have to presume your Fine and Forfeiture Fund is being operated under the general laws of the State. In other words, I am presuming you have no local law affecting such fund. After the defendant is convicted in the County Court for an offense and he pays off in cash, confesses judgment or is sentenced to hard labor when the witness fees are collected they go to the witnesses in the particular and individual case and you should pay the same to such witnesses. These fees are paid for individual services in each separate and individual case.

All fines and forfeitures go into the County Treasury credited to the Fine and Forfeiture Fund and are used to take care of witnesses' and officers' costs where the State fails or the case is not pressed, Biennial Report, Attorney General, 1930-1932, page 170.

All claims of witnesses for their attendance on the part of the State in a criminal case where the State fails should be presented for registration to the County Treasurer and should be paid by him according to registration; as stated above this includes cases where the State has failed or nolle prosequi has been ordered or the defendant having been convicted, execution has been returned against him endorsed "no property found". See Section 4039 Code of Alabama, 1923 as amended by an Act approved February 18, 1927, General Acts, 1927, page 45.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 5, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

The Judge of the County Court is without authority to permit a criminal case based on a complaint to be withdrawn and filed, and when

such illegal act is permitted the costs accruing up to the time of the attempted withdrawal and filing cannot become a claim against the Fine and Forfeiture Fund of the County.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 25, 1936, in which you request my opinion as follows:

"Under date of March 2, 1936, you rendered an opinion to Hon. Chas. W. Lee, State Comptroller, saying 'The County Court is without authority under any circumstances to allow a prosecution to be withdrawn and filed.'

"1. What is the status of a County Court case in which the bench entry is 'Withdrawn and Filed?'

"2. In such a case are the officers fees a legal claim against the Fine and Forfeiture Fund of the County?"

Answering your first inquiry, I call your attention to an opinion of this office in Quarterly Report of Attorney General, Vol. 1, p. 245. In this opinion this office holds that there is no authority of law for withdrawing and filing a complaint in a criminal case in the County Court; that section 4548, Code of Alabama, 1923, applies to indictments and to them only under certain conditions. So, such withdrawing and filing of such a complaint in the County Court, is without authority of law and void. Therefore, the costs accruing up to the time of such an attempt to withdraw and file cannot become a charge against the Fine and Forfeiture Fund of the County. In other words, you cannot make this a legal claim against such fund by the performance of an illegal act. Therefore, the only thing to do is to reinstate the case on the docket of the County Court, and then let the case proceed as though such illegal act was never attempted.

My answer to your second inquiry is in the negative for the reason set out in my answer to your first.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 5, 1936.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Under the system of working convicts in Jefferson County as soon as a convict is sentenced, the cost of preparing the food and serving same together with his feed bill are chargeable to the county and not the State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 30, 1936, in which you request my opinion as follows:

"Please advise my on the following questions:

"1. Would not Jefferson County be liable for the expense of feeding any prisoners otherwise chargeable to the State if they are fined or sentenced to hard labor and held in jail several days after the date of sentence?

"2. Would a Sheriff be entitled to collect from the state the Sheriff's allowance, which is provided on a graduated scale, for any prisoners he had in his jail that were otherwise chargeable to the State up to date of sentence and were held in jail several days after the date of sentence?"

Answering your first request, under this system for working convicts in Jefferson County as soon as the sentence is pronounced the person sentenced becomes a ward of the county and his feed bill is payable by the county from then on and the State is no longer liable for such bill. Jefferson County works her convicts upon the County roads and does not turn them over to the State, under the Act approved February 18, 1927, General Acts, 1927, page 52. Biennial Report Attorney General, 1930-1932, page 177.

Answering your second request, I am presuming where you made use of the word "Sheriff's allowance" you have reference to the allowance given Sheriffs for preparing and serving food to prisoners in jail. This being true my answer is in the negative for the reason given in my answer to your first request. It naturally follows if the State is not responsible for the feeding of prisoners after sentence in Jefferson County it could not be made liable for the cost of preparing and serving food. I am assuming that you refer to prisoners sentenced to jail or hard labor and do not refer to prisoners sentenced to the penitentiary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 5, 1936.

Hon. B. G. Robison,
Judge of Probate,
Pickens County,
Carrollton, Alabama.

Probate Judges are required by Act No. 179, S. 158, approved April 21, 1936, (General Acts 1936, Extra Session) to use the marriage license forms prepared and furnished by the Bureau of Vital Statistics of the State Board of Health. If the old books cannot be used to record the new licenses, then new books should be purchased.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"At your earliest opportunity, please answer the following question with reference to the construction of Senate Bill 158 approved April 21st, 1936, which is an amendment to Section 1153 of the Code of Alabama, 1923:

You request my opinion as follows:

"Am I, as Judge of Probate, required by this Act to adopt for future use the enclosed marriage license form prescribed by the Bureau of Vital Statistics of the State Board of Health, and to purchase new records on which to record the new form license and the other data embraced therein?"

In my opinion your question should be answered in the affirmative. Act No. 179, S. 158, approved April 21, 1936, (General Acts 1936, Extra Session) provides in part as follows:

"* * * All marriage license forms shall be prepared and furnished by the Bureau of Vital Statistics of the State Board of Health."

If you cannot use your old books in recording the new marriage licenses, then you should procure the necessary books to record the licenses, as you are required to do by statute.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 6, 1936.

Hon. Gaston Scott,
President, State Highway Commission,
Capitol.

Highway Department may advance money for securing right of way where county fails to furnish same.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of August 3, 1936, in which you request my opinion as follows:

"The Highway Department has been allotted the sum of \$87,000 by the Federal Government for the purpose of construction of a grade crossing elimination on the Old Shell Road in Mobile. This money is given for the purpose of eliminating dangerous grade crossings and such money is contributed solely and entirely by the Federal Government, and no appropriation nor matching of funds is required from the State Highway Department or the County. However, the Federal Government does not allow any of this money for allocation for grade crossings to be spent for the payment of rights of way necessary. Mobile County has refused to acquire this said right of way and the Attorney General's office has instituted condemnation proceedings upon the previous request of this Department and all that remains to be done is to pay the condemnation award in the Court in the amount of approximately \$12,500. If this amount is not paid in the Court in the near future, the Federal Government will withdraw this allocation and allow the money to be used in some other locality in which the right of way can be secured.

"The Highway Code, contained in the 1927 General Acts page 358, Section 31, provides as follows: 'Right of way for Roads: How acquired—The right of way deemed necessary by the State Highway Department for a road or a bridge, constructed under the provisions of this article shall be acquired by the County, in which the road is to be located, without expense to the State.

"Should the County fail to or refuse to acquire the necessary right of way the State through the State Highway Department shall have authority at the expense of the County to acquire such right of way, either by purchase or the exercise of the right of eminent domain in the condemnation proceedings as provided for under the laws of this State."

"It is the opinion of the writer that the above section and in particular the last sentence which is underscored, gives the State Highway Department the right to acquire the right of way and pay for same with Highway Department funds, in the event that the County fails or refuses so to do. Inasmuch as Mobile County has refused to acquire the necessary right of way for the said underpass, this Department wishes to pay the condemnation award into the Court on the condemnation proceedings already had under the authority of the above quoted section.

"Please advise if the Highway Department does have the authority to pay this money for the condemnation award into the Court and also from what fund said money should be drawn, as well as how the warrant should be made payable. The Attorney General is also requested to take whatever steps are necessary to secure repayment of this money from Mobile County. In order to insure prompt action in the payment of this money, it is suggested that the State Comptroller be officially advised as to the authority of the State Highway Department to pay the said condemnation award."

I am of the opinion that the Highway Department may properly pay into Court the amount assessed in the condemnation proceedings above mentioned.

The first part of Section 31 of the Highway Code (1927 General Acts, page 348 at page 358) above quoted by you, provides that the county shall furnish rights of way for State Highway projects. The second part of said section provides that if the county fails or refuses to acquire the necessary right of way, the State, through the Highway Department, may acquire same at the county's expense.

In order to acquire the required easement, funds are necessary, and these funds may properly be advanced by the Highway Department. If the Highway Department could not make such an advance, the quoted provisions of the law would be without practical application and a nullity. If for instance, the State should attempt to secure the right of way by contract to purchase, and then be compelled to wait until the county voluntarily furnished the funds or furnished them after litigation, the contract would ordinarily have expired. Under the present circumstances the right to pay the money into court will expire at the end of the statutory limit and the work done in effort to acquire right of way would be valueless.

In short, if the State cannot advance the necessary funds, we are in the situation of having a statute which gives the State the right to acquire a right of way, without practical means of acquiring it. The Legislature did not intend such a situation.

The general rule as expressed in Corpus Juris is as follows:

"Statutory grant of a power of right carries with it, by implication, everything necessary to carry out the power or right to make it effectual and complete * * *." (Numerous authorities cited) 59 C. J. 973.

I am of the opinion, therefore, that the Highway Department may properly advance the funds required to be paid into Court under the award of the commissioners. As soon as this is done if you will so advise me I will take action looking to the repayment by the county of the amount advanced.

Payment may be made from funds appropriated by Act No. 373 of the 1935 Legislature (page 792, General Acts 1935 at page 798, Section XII (3)). Warrant should be drawn to the Judge of the Probate Court of the County in which the project is located, in this case Mobile County.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 7, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Under the provisions of the Act commonly known as "County Budget Act," effective October 1, 1935, a County is authorized to refund and extend the payment of a temporary loan interest warrant over a period of twenty years, even though the warrant is not due and payable until February 1, 1936; after the refunding of this temporary loan a County is authorized to borrow 95% of the amount of such temporary loan for the succeeding year.

Opinion by the Attorney General.

Dear Sir:

I beg to acknowledge receipt of your letter of August 3, 1936, as follows:

"Under the Provisions of the County Budget Law the Counties have authority to issue refunding interest bearing warrants payable over a period of 20 years.

"The examiners find that a county had a Temporary Loan of we will say \$10,000.00 due February 1, 1936. Has the County authority to issue refunding warrants for the \$10,000.00 Temporary Loan due February 1, 1936.

"The law also states that the counties can make a temporary loan against anticipated revenue not to exceed 95% of the Temporary Loan the preceeding year.

"Can the counties issue refunding interest bearing warrants for the \$10,000.00 due February 1, 1936 and make a new Temporary Loan for \$9,500.00 against anticipated revenue."

Your inquiry invloves an Act of the Legislature of Alabama approved September 9, 1935, commonly known as the "County Budget Act."

I shall confine myself to the questions propounded. Under Section 9 of the Act the counties have authority to issue refunding interest bearing warrants payable over a period of twenty years. The county you refer to in your inquiry has a temporary loan of \$10,000.00 due on February 1, 1936. I call your attention to the following part of Section 9:

"It shall be the duty of all Boards of Revenue, County Commissioners and other like governing bodies of the counties to refund all warrants,

which are unpaid and past due at the time this Act goes into effect (the Act is effective on the first day of October, 1935), and for which there is no money available at that time."

I do not think the Legislature intended to say that a temporary loan that falls due on the day after the Act becomes effective cannot be refunded and extended as provided in Section 9. Such a construction would be unreasonable would, in part, defeat the purpose of the Act. I do not think the Legislature intended that the Act should apply solely to the refunding of warrants which are unpaid and past due on October 1, 1935, the effective date of the Act. Such a construction as this would, in a large measure, defeat the very purpose of this Act. Temporary loans made to counties are usually payable by the counties to the borrowing sources during the months of February, March and April. As a rule, all taxes are collected by March 1st of each year. If the Act is construed so that it includes only those warrants due and unpaid on the effective date of the Act, viz: October 1st, 1935, it would leave out a large number of temporary loans that fall due during the first three or four months of the year 1936. Undoubtedly, one purpose of the Act is to enable the counties to refund and extend over a period of years these troublesome temporary loans. It is my judgment that the county you have in mind has a right under the Act to refund the warrant representing the temporary loan, due February 1, 1936, even though the loan, strictly speaking, was not due and unpaid on the effective date of the Act, viz: October 1, 1935.

It is my judgment that a county may issue refunding interest bearing warrants for the \$10,000.00 mentioned in the third paragraph of your letter and make a new temporary loan for \$9,500.00 in anticipation of the collection of revenues. I beg to refer you to Section 11 of the Act dealing with temporary loans. Section 11 provides that nothing in the Act shall be construed to repeal the general laws of the State of Alabama authorizing counties to make temporary loans in anticipation of collection of taxes. But section 11 provides that hereafter no temporary loan in anticipation of the collection of taxes shall be made exceeding 95% of the amount of such temporary loans made during the preceding fiscal year, except for the purpose of meeting emergencies provided in Section 17 of the Act.

It is my judgment that under the provisions of this Act a county may refund a temporary interest bearing warrant although the warrant may not be due for several months after the effective date of the Act, and that in order to function the following year the county may borrow 95% of the loan of the preceding fiscal year. The plan set forth in the Act seems to be as follows: That as regards temporary loans, a county is authorized to refund such warrants and to extend the payment of the principal and interest over a period of twenty years. This would, of course, increase the indebtedness of the county by making it necessary for the county to provide in its budget each year thereafter for the payment of one-twentieth of the principal and interest. Presumably the county during the fiscal year following the year in which the temporary loan warrant is funded would need an additional temporary loan to run the county during this following fiscal year. In order that the county may run the Act says that the county may borrow 95% of the \$10,000.00, or \$9,500.00. In this way the Act provided for a 5% reduction in the amount of the temporary loans each year. In other words, after a lapse of ten years, under the provisions of the Act, the amount of the temporary loan would be only 50% of the amount first refunded. The purpose of the Act seems to be that by diminishing the amount of the temporary loan 5% each year, the temporary loan will finally be wiped out, provided the

county is able in the preparation of its budget to make such reductions as will take care of the decreased revenue. The Act in practice works out as follows: The county is expected over a period of twenty years to completely wipe out this temporary loan; but no additional revenue is provided. This means that additional revenue is provided. This means that the county budget must be cut each year in order to take care of the 5% reduction provided for in the Act. The Act contemplates that the old temporary loan shall be wiped out at the rate of 5% per year over a period of twenty years, and that the new temporary loan shall be gradually diminished to **nothing**, at the rate of 5% per year. In other words, under the provisions of the Act the first \$10,000.00 refunded would be entirely wiped out over a period of twenty years, and, at the rate of 5% per year, the new temporary loan would be gradually wiped out.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 14, 1936.

Hon. J. E. Corbin,
Deputy Clerk,
Marshall County,
Albertville, Alabama.

Court costs—The defendant does not have to pay the costs that have accrued in his own defense before he is discharged.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of July 13, 1936, in which you request my opinion as follows:

"Mr. A is convicted and pays the fine and cost in cash. May I as Clerk of the Circuit Court charge Mr. A for issuing his (Defendant's) witnesses also for the Sheriff serving them."

Your question is not very clear to me, but I presume that you wish to know if the defendant has to pay the costs that have accrued in his own defense as for issuing subpoenas for his witnesses, and for serving the same before he is discharged.

In my opinion your question should be answered in the negative. There is a distinction between the cost incurred for the State in State prosecutions, and those incurred for and by the defense. The costs incurred by the State are taxable against the defendant on conviction, and become so much a part of the penalty or punishment, as that the defendant may be sentenced to hard labor for their payment; and in the event the punishment be only a money fine, or fine and costs, the defendant may obtain his liberty by confessing judgment with sureties for fine and costs. But this judgment does not include the costs incurred by the defendant. The costs incurred by the defendant are personal to the defendant and amount to a contract debt, and cannot be enforced by restraint of defendant's liberty. The costs incurred by the defendant can only be collected as his other contract debts are collected.

I refer you to the following cases:

Burgin v. Hawkins, Treasurer, 101 Ala. 326;
Cohen v. Coleman, 71 Ala. 496;
Bradley v. State, 69 Ala. 318.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 14, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Section 17 of the County Financial Control Act, Act No. 379, General Acts 1935, page 803, approved September 9, 1935, gives the county governing body the authority to issue its interest bearing warrants to procure the necessary funds for which to pay the expense of the audits of the several offices of the county by the Comptroller's office when current funds are insufficient for such purpose and when in the judgment of the county governing body such expense constitutes an "emergency" obligation of the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 18th, 1936, which follows:

"Is it legal for a county to borrow money under Section 17 of the County Budget Act, General Acts 1935, page 808, to pay for the expense of the audit by the Comptroller's Department of the several offices of the county when insufficient revenue has been set aside in their current budget for this purpose."

It is my opinion that Section 17 of the County Financial Control Act, Act No. 379, General Acts 1935, page 803, approved September 9, 1935, gives a county governing body authority to issue its interest bearing warrants to procure the necessary funds with which to pay the expense of audits of the several offices of the county by the Comptroller when current funds are insufficient for such purpose and when in the judgment of the county governing body such expense constitutes an "emergency" obligation of the county.

Section 17 of the County Financial Control Act, *supra*, reads as follows:

"Emergencies. In the event any situation over which the Board of Revenue, County Commissioners or other like governing body has no control results in an appreciable obligation against the county over and above what said Board has reason to anticipate, and for which no moneys from the current year's income are available to pay, such Board may issue its interest bearing warrants, as now authorized by law, in an amount sufficient to pay such emergency obligation. And the interest and maturities or principal of such loans shall constitute a part of the budget for the year in which they mature. But before such warrants shall be authorized or sold under this Section, such Board shall inquire into and find that such emergency obligation has accrued, and such finding spread upon the minutes of its proceedings."

Act No. 218, General Acts 1935, page 601, approved July 17, 1935, provides that the records of county officers in all counties in this State shall be examined at least once every two years.

Section 749 of the Code of Alabama, 1923, provides how the expense of these examinations shall be paid.

Under an opinion rendered to you by this office on July 9, 1936, it was held that the expense of audits of county officials is not such a claim against a county as to require presentation to the county governing body for approval.

Therefore, it is my opinion that the matter of examination of the records of the county officials of the various counties of this State and the payment of the expenses of the same by the respective counties is not a matter over which the county governing body has any supervision or control.

Since Section 17 of the Financial Control Act, *supra*, provides that the county governing body may issue its interest bearing warrants in an amount sufficient to pay any emergency obligation, which arises from a situation over which the body has no control that results in an appreciable obligation against the county over and above what the governing body had reason to anticipate. It is, therefore, my opinion that a county governing body may issue its interest bearing warrants to procure the necessary funds with which to pay the expense of the audits of the several offices of the county by the Comptroller's Department when current funds are insufficient for such purpose and when in the judgment of the court such expense constitutes an "emergency" obligation of the county.

However, the county governing bodies of the various counties of this State should bear in mind when they make up their annual budgets that there will probably be such an expense against the county and should set aside an amount which they have reason to believe will be sufficient to pay such expense.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 14, 1936.

Dr. W. D. Partlow, Superintendent,
The Alabama Insane Hospitals,
Tuscaloosa, Alabama.

Alabama Insane Hospitals—Authorized to pay amount assessed against hospital by the State Board of Adjustment from any funds constituting a surplus above actual necessary operating expenses of the institution.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 20, 1936 in which you request my opinion as follows:

"I enclose you herewith decree entered against the hospital by the State Board of Adjustment in favor of one Evade Hall, colored. The amount of \$1,000.00 is assessed against the hospital to be paid to the

widow of a former colored employee, who died as a result of an injury inflicted by a patient in the institution.

"I am uncertain of my authority as Superintendent of the hospitals to pay this amount out of appropriations made for 'The support, maintenance, repairs and improvements of the Alabama Insane Hospitals,' as quoted from Section 1463 of the Code of Alabama, 1923. Will you please give me an opinion on this point?"

In my opinion, the Alabama Insane Hospital is authorized by the Act creating the State Board of Adjustment (General Acts 1935, page 1164) to pay the sum of \$1,000 to Evade Hall, the widow of Joe Rufus Hall, a former colored employee of the hospital, in accordance with the decree entered against said hospital by the State Board of Adjustment. I call your attention to Section 3 of the 1935 Act creating the State Board of Adjustment, found on page 1165 which reads as follows:

"The State Board of Adjustment in its findings of facts and its findings and decrees as to the amount of payment may also find the agency or agencies of the State of Alabama which inflicted the injury or damage complained of, if the Board finds there is injury or damage done to persons or property, and **may adjudge and find that said damage shall be made out of the appropriation made to the agency or department of the State of Alabama**, whose employees, servants, agents, or instrumentalities, inflicting the damages and injuries complained of. Provided, however, that said Board may order the payment of any claim out of any fund or funds herein appropriated." (Emphasis supplied.)

You will note that an express authority is given to the State Board of Adjustment to assess the damage against the appropriation of that agency or department of the State of Alabama whose employees, servants, or instrumentalities cause the damage in question.

The Act in question is in its nature a relief Act. It is specifically stated in Section 14 that:

"The purpose of the Act is to provide a method of payment to persons for injuries to person or property or for death, where in law, justice or good morals, the claim should be paid."

It is also provided by Section 2 of the Act that nothing contained in said Act shall be construed to confer upon the State Board of Adjustment "any jurisdiction now conferred by law upon the Board of Compromise and nothing herein contained shall be construed to confer jurisdiction upon the State Board of Adjustment to settle or adjust any matter or claim of which the courts of the State have jurisdiction".

It is clear, therefore, that any award made by the State Board of Adjustment must be in nature a gratuity on the part of the State, which under the law cannot be sued.

The funds appropriated by Section 1, Subsection X (4) of Act No. 373 (General Acts 1935, page 792, 797) to the Alabama Insane Hospitals for the "support, maintenance and repairs of the Alabama Insane Hospitals" were and are intended primarily for the support and maintenance of the said Alabama Insane Hospitals and the care of indigent and criminal patients. I do not believe that these appropriations may be used to pay for a moral obligation of the State of Alabama unless and until there is a surplus over and above the necessary operating expenses of the institution.

It is therefore my opinion and I advise you that while the Alabama Insane Hospital has the authority to pay the amount assessed against it by the State Board of Adjustment, nevertheless, this payment should not be made unless and until there is a surplus over and above the actual necessary operating expenses of said Insane Hospital.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 14, 1936.

Hon. H. E. Williams,
County Superintendent of Education,
Lauderdale County,
Florence, Alabama.

Officers—Member of County Board of Education vacates office upon removal of residence from county in which he was elected.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of August 8, 1936, in which you state as follows:

"For the past several years Mr. H. M. Mann has resided in Lauderdale County and has been a member of the county board of education. About 6 months ago he and his family moved to Madison County, Alabama, where he is manager of a store in Huntsville.

"He has not attended any meeting with the county board of education since he moved to Madison County about 6 months ago until last week when we had a meeting. When Mr. Mann moved out of Lauderdale County the remaining members of the board have held meeting without filling the vacancy caused by the removal of Mr. Mann from Lauderdale County."

You wish to know if Mr. Mann vacated his office as a member of the County Board of Education by moving from Lauderdale County to Madison County where he has established a residence and gone into business.

In my opinion, your question should be answered in the affirmative.

Section 2697 of the 1923 Code of Alabama, provides in part as follows:

"2697. How offices are vacated—Any office in this state is vacated—
* * *

(3) By (the incumbent) ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed."

The Supreme Court, in construing said section in the case of Barker v. Conway, 214 Ala. 366, 108 So. 18, stated as follows:

"Unquestionably, we think, our statute requires an actual residence by the holders of public office within the political division for which they are appointed or elected, and which it is their duty to serve * * * We do not mean to hold that any temporary absence by a public officer would

have that effect. Each case must be decided on its own facts, with a due regard for the elements of intention and actual absence."

From the above, it is my opinion that if a member of the County Board of Education actually changes his residence from the county in which he was elected, or appointed, and is not merely temporarily absent therefrom, he would vacate his office.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 15, 1936.

Hon. Harry M. Touart,
Tax Assessor,
Mobile County,
Mobile, Alabama.

Taxation, assessment of property redeemed from tax sale—

1. Where property is redeemed from tax sale, the same should be listed and assessed for the current assessment year in which redeemed but without penalty.

2. If such property is not assessed before the end of the current assessment year, it should be assessed as an "escape".

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of August 1, 1936 addressed to Mr. Frontis H. Moore in which you ask my opinion on the following:

"The matter of penalizing property redeemed after the assessing period has closed, that is after the third Monday in January, has caused some confusion in this office, as for the last eighteen or twenty years, to my knowledge, by the order of the examiners of accounts, no penalty has been charged on assessments that were redeemed after the assessing period closed, which before the nineteen thirty-five law was passed, was the first Monday in February.

"* * * I am unable to find any law except the amendment to Section 291, which refers to installment payments, and this amendment was approved on March 26th, 1936.

"I have practically finished the tax books for the tax year of nineteen thirty-five and have not penalized assessments redeemed after the third Monday in January, for the reason that I always felt that the property was state property until same was redeemed, and the tax payer had no opportunity to assess the property during the assessing period, for the reason that same was sold for taxes, and that when same was redeemed after this period had closed, the tax assessor had no legal right to make a demand on the tax payer to file his assessment. And Mr. King, my predecessor, always felt that where no demand could be made, that no penalty could be charged.

"As you doubtless know, that the law requires that I furnish the state with an abstract not later than the second Monday in August, which is the tenth of August. It will require some length of time for

me to go through the books and penalize those assessments that were redeemed after the assessing period."

Your inquiry calls for consideration of the following sections of the 1935 Revenue Act.

Section 29 provides that the return and listing of property for taxation by the Assessor must commence on the first day of October in every year and be completed by January 1st following, but that the Assessor may be allowed through the third Monday in January to make a supplemental assessment.

Section 31 requires every person to come in before the Tax Assessor and list his property after the first of October.

Section 41 requires the Assessor after the 31st of December to make a demand on each tax payer to return his property and it is the duty of the taxpayer to list his property before the third Monday in January.

Section 44 provides that upon the failure to secure from the tax payer his list of property on or before the third Monday in January the Assessor shall make an information assessment against him and add a penalty of 10%.

Section 45 provides that whenever the Assessor shall discover that any property has escaped taxation in any assessment within five years **next preceding the current year** he shall assess the same and add a 10% penalty.

There are other provisions providing for notice, appeal, etc., in Section 45.

Section 57 provides that the Tax Assessor shall complete his abstract and forward to the Comptroller not later than the second Monday in August, this you refer.

Section 269 as amended by Acts 1935 page 1113, sub-division (b) relating to redemptions provides:

"Upon application to the Probate Judge to redeem land where the same has been sold to the State for taxes, which application shall be made on blank forms furnished by the State Land Commissioner, the Probate Judge shall submit such application to the Tax Assessor of the county in which the land sought to be redeemed is located and the Assessor shall, without delay, enter on such application an assessment value for each of the years for which **taxes are due** subsequent to the year for which such land was sold to the State."

Section 277 in full provides:

"That in five days from redemption of any real estate bid in by the State the **Judge of Probate shall notify the Tax Assessor** and Tax Collector of his county thereof and shall, on demand, pay to them the costs and fees to which they are respectively entitled; and **the assessor shall enter such real estate**, and the name of the person redeeming the same, on an appropriate list to be kept by him for assessment."

Section 291 as amended by Act No. 49 approved March 26, 1936, provides in full:

"Section 291. Whenever any real estate has prior to January 1st, 1935, been sold for taxes and bid in by the State at tax sale, the same

may be redeemed in the same manner as heretofore provided for sales made after January 1st, 1935, except that the following additional provisions shall apply. All persons having the right to redeem, shall have four years from the date of sale to redeem and such redemption shall be made as in other cases, except that the party desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties. Any person having the right to redeem any property sold to the State for taxes, and who desires to redeem under the provisions hereof, shall, before January 1st, 1937, make application to the Probate Judge of the County where the real estate is situated, the same to be approved by the State Land Commissioner, and shall deposit with the Probate Judge a sum equal to not less than one-fourth of accrued taxes, without interest or penalties, and annually thereafter shall pay not less than one-fourth of said sum to the Probate Judge. The party redeeming said property shall, **within thirty days from the date of making said initial payment, assess said property for taxes for the then current tax year**, and the same shall be assessed for each year thereafter in the manner required by law, and the taxes for the subsequent tax years shall be paid in the manner required by law. Upon the payment of all back taxes, as provided for herein, and of all taxes for the subsequent tax years which have accrued, a certificate of redemption shall be issued as in other cases. This act is to take effect upon its approval by the Governor."

The foregoing, I believe, are the pertinent statutes. I also call your attention to the following opinions in Quarterly Report of Attorney General, Volume 1, page 207, at page 215. In discussing Section 291 it was stated:

"It is therefore my conclusion that as to property sold to the State for taxes prior to January 1, 1935, if application is made within four years from the date of sale redemption is authorized by Section 291 without the payment of interest and this is true whether such redemption be for cash or on the partial payment plan. I think further that should a person paying the first installment desire to complete his payments in less time than allowed, he has that right though such payment must be in multiples of one-fourth of the total amount originally due."

It therefore appears that Section 291 did not provide a system of redemption essentially different from that provided by Section 269 except for the limited period set out redemptions might be made on an installment plan and, further, that such redemptions might be made without the payment of interest.

In further support of this it was stated in opinion in Quarterly Report of Attorney General, Volume 1, page 331, that if a person elects to pay cash (when redeeming under Section 291) without interest and penalties that the usual redemption certificate should be issued.

In Quarterly Report of Attorney General, Volume 2, page 205, after discussing Sections 291 and 292 the following conclusion was made:

"The conclusion that I reach from both the sections read together is that upon making the installment payment required the lands pass back to the redemptioner and hence it is his duty to annually assess and pay the taxes thereon for the years subsequent to such redemption."

In opinion in Quarterly Report of Attorney General, Volume 2, page 341, it was stated that where property is sold for taxes to an individual that there-

after it should be assessed to such individual and where the individual purchaser failed to assess the same within the current year it should be assessed to him as an escape.

Your attention is likewise called to Acts 1932, page 17, amending Section 3110 of the Code of 1923 (which appears as Section 269 of the 1935 Act) and opinion appearing in Biennial Report 1932-1934, page 279 construing said Act.

My attention has also been called to letter of Hon. John C. Curry, Chief Clerk of State Tax Commission, to Hon. W. M. Vaughan, Judge of Probate, Dallas County, under date of January 10, 1936, which, after reviewing various statutes concludes with this paragraph:

"There is no doubt that the taxes for the current assessing year must be assessed and collected and the manner of so doing should be determined by a reasonable construction of the law as it exists. In conclusion we say that it is our opinion that where the taxpayer could not return the property before the third Monday in January for the reason that it had not been redeemed from the State he could not be penalized for failure to make the return by that time. It is apparent, however, that if the taxpayer fails or refuses to make the return after he has redeemed the property, the assessor may assess the same as an escape and add the penalty required by law."

It is needless to observe the departmental rules and constructions of great weight in the construction of doubtful statutes especially when long adhered to and acquiesced in. *State v. Hobbie Grocery Co.* 225 Ala. 151.

I further call your attention to opinion in Quarterly Report of Attorney General, Volume 3, page 8, relating to assessments of stocks of goods in which it was held that stocks of goods brought in after October 1st are assessable in the manner provided by sub-section (d) of Section 10 are not subject to the penalty of 10% for the current year. It was stated therein as follows:

"It would appear that unless Section 25 is broad enough to provide for a demand in cases of this sort that the law has made no provision and certainly I do not find any provision providing a time in which such property should be listed after the party begins business."

"Under the rule of strict construction against the State I am of the opinion that the demand fee and the 10% penalty are not chargeable in cases of this sort.

"It is, however, none the less the duty of the Tax Assessor to list such property for assessment whenever he discovers any."

I have thus recapitulated the relating statutes, opinions and constructions in order that the state of the law may be before us at the time of your request.

It is my judgment that Sections 29 and 31 relate to the listing of property owned by tax payer on October 1st of each assessment year and that Sections 41 and 44 apply primarily to such cases. In other words, if a tax payer owns property on October 1st he should, before January 1st following, list said property for assessment, that upon tax payer's failure to do so by January 1st it becomes the duty of the Tax Assessor to make demand on the tax payer for such return; if the tax payer does not list such property by the third Monday in January the Assessor must make an information assessment and add a 10% penalty.

In an opinion in Quarterly Report of Attorney General, Volume 2, page 280, the making of this demand was held to be mandatory and under the new Act the demand fee was held collectible in all cases.

Section 45 provides for the making of escape assessment by the Tax Assessor. While the penalty is added it applies to property which "has escaped taxation in any assessment within five years **next preceding the current year**". An escape assessment is, therefore, not to be confused with penalty assessment required by Section 44.

Coming to the particular question it appears that where property is redeemed subsequent to October 1st of any assessment year that its status is not exactly the same as that owned by tax payer on October 1st and if such property is redeemed subsequent to the third Monday in January it seems clear that there is no authority for making a demand and it is at least doubtful if there is no authority to make a demand whether the 10% penalty can be imposed.

Section 277 while slightly different from the Act of 1932 provides that the Probate Judge shall notify the Assessor within five days from redemption and the Assessor shall enter such real estate. I think it is reasonably certain that this contemplates that the Tax Assessor assess the property for the current assessment year. This is especially true in view of the fact that other sections authorize redemption upon payment of the annual amounts which would be due and does not provide for the payment of an additional year as the former statute did. Prior to the amendment of Section 291 I can see no difference in redemption under Sections 291 and 269, so far as assessment for the current and future years is concerned.

Under the holdings of this office above referred to when even the partial payment was made the title passed back to the tax payer and it was the duty of the Probate Judge to report to the Assessor and the duty of the Assessor to list for the current year. I, therefore, conclude that where redemptions were so made that it was the duty of the Assessor to assess the property for the current assessment year without the imposition of 10% penalty. The foregoing however, is not intended as authority to **relieve the tax payer of his duty to see that his property is listed for all years.**

I am in accord with the quoted part of Mr. Curry's letter but I think that it should be limited to "escapes". In other words, if property is redeemed during the assessment year, October 1, 1935 to September 30, 1936 and if by inadvertence or otherwise the Probate Judge does not report, the tax payer does not list and the Tax Assessor does not assess such property prior to October 1, 1936 when taxes should become due then the property is an "escape" and it is the duty of the Assessor to assess it as an "escape" and assess the penalty. I believe that this answers all the questions except the effect of the amendment to Section 291 of March 26. This amendment was written primarily for the purpose of definitely clearing up any doubt as to whether the Probate Judge or the Tax Collector should collect the annual taxes in cases where redemption was made on the installment plan. It merely confirms the previous opinion of this office above referred to. It is my judgment that this is a particular requirement to the tax payer and to return his property within thirty days after redemption but I do not find any specific authority for making a penalty assessment for his failure to so do. Presumably the Probate Judge has already reported and the Assessor has already entered the assessment as authorized by Section 277. I, therefore, conclude that where redemptions are made during the assessment year

that the property should be assessed for such current year but that a penalty is not imposable until the end of such assessment year when the property becomes an escape.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 15, 1936.

Hon. John I. Smith,
Tax Collector,
Etowah County,
Gadsden, Alabama.

Taxation—Tax Collectors, Redemption—

1. Where real estate is sold to the State for taxes, and not redeemed, Tax Collector should be allowed credit under Section 178 of 1935 Revenue Act for taxes assessed but which become due subsequent to such sale.

2. Where real estate is redeemed from tax sale to State, taxes becoming due subsequent to such redemption are collectible by Tax Collector.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of July 31, 1936, stating:

"Kindly advise if I should collect 1936 taxes on property sold to the State in June of this year for 1935 tax. The Tax Assessor had assessed this property prior to my tax sale.

"Also do I collect the 1936 taxes on property which has been partially redeemed in the Probate Office and abstracted to me by the Tax Assessor?"

In reply to your first question I am assuming the following facts:

1. That certain real estate was assessed as of October 1, 1934.
2. That taxes thereon became due October 1, 1935.
3. That same being unpaid the real estate was sold to the State for such taxes.
4. That as of October 1, 1935, such real estate was assessed and but for the sale to the State, taxes would be due thereon on October 1, 1936.

If these premises be correct, I advise:

The real estate being sold to the State prior to October 1, 1936, the Tax Collector should be given allowance therefor as an item sold to the State under the provisions of Section 178 of the 1935 Revenue Act.

In answer to your second question I assume the following:

That certain property was redeemed from tax sale during the tax year October 1, 1935 through September 30, 1936 and subsequent to such redemption the Tax Assessor listed and assessed such property. You wish to know

if you should collect taxes on such property that will become due October 1, 1936.

My answer to this is, of course, in the affirmative. It is the duty of the Tax Collector to collect all taxes due and when property is redeemed it immediately becomes liable for assessment and taxes thereon are payable when due.

See 277 Revenue Act 1935,

See 291 Revenue Act 1935, as amended by Act No. 49, approved March 26, 1936,

Opinion to Homer F. Mitchell, Probate Judge, Cullman County, dated June 15, 1936, copy of which is enclosed.

Opinion to Roy Johnson, Tax Assessor, Jefferson County, Quarterly Report, Vol. 2, page 205.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 15, 1936.

Hon. C. B. Gullatt, Jr.,
Judge of Probate,
Russell County,
Seale, Alabama.

1. Taxation; redemption—Where real estate is sold for taxes to a person other than the State a mortgagee whose mortgage was duly recorded at the time of the sale has a right to redeem such land at any time within three years even though such purchaser has served written notice upon him more than one year preceding the expiration of such three year period.

2. Mortgagee of record at the time of sale can redeem at any time within one year from the date of the written notice from the purchaser at the tax sale served upon him, even though three year period from time of sale had previously expired.

Opinion of Assistant Attorney General Moore.

Dear Sir:

I have your letter of July 28th, 1936, in which you state:

"Please explain to me FULLY the meaning of the last sentence of Section 298 of the 1929 Revenue Code. 'Persons entitled to, and time allowed for redemption'. This sentence begins with the words 'If the mortgage or other instrument, etc.,' and ends with the words 'shall be sufficient notice.'"

I do not fully understand what you desire but am presuming that you wish to know the time a mortgagee has to redeem from a tax sale where the lands are sold to an individual.

I call your attention to an opinion in Biennial Report of Attorney General, 1932-1934 at page 43 which I think answers your question. This opinion holds (1) that where land is sold for the payment of taxes upon which there was at the date of sale a mortgage duly recorded in the office of the Probate Judge such mortgagee has right to redeem such land from such sale at any time within a year from the date of written notice from the purchaser of

his purchase of said land at tax sale and (2) a tax deed executed to the purchaser at such tax sale before the elapse of twelve months after such notice served upon such mortgagee in no way effects the right of such mortgagee to redeem within the one year period after notice. The statute (and I might state that Section 298 of the Revenue Compilation of 1929 appears as Section 268 of the Revenue Act of 1935) provides that real estate sold for taxes and purchased by any other person than the State may be redeemed at any time within three years from the date of sale by the owner, mortgagee, etc., and concludes with the following:

"If the mortgage or other instrument creating a lien upon which a party seeks to redeem is duly recorded at the time of said tax sale the said party shall, in addition to the time herein specified, have the right to redeem said real estate sold or any portion thereof covered by his mortgage or lien at any time within one year from the date of written notice from the purchaser of his purchase of said lands at tax sale served upon such party and notice served upon either the original mortgagee or lien holder or their transferee of record or their heirs, personal representatives or assigns shall be sufficient notice."

Reading the entire statute together with the construction given in the opinion above cited it is my judgment that where lands are sold at a tax sale to a person other than the State the mortgagee has in any event three years in which to redeem under the present statute, even though the one year period from the time of notice had previously expired; that in no event can he lose his right to redeem until the expiration of one year from the service of written notice upon him by the purchaser at the tax sale, even though the three year period from time of sale had already expired. To illustrate, if the purchaser immediately after the purchase gives such mortgagee notice, such mortgagee has three years in which to redeem; if the purchaser waits until the expiration of one year from the date of sale to give the mortgagee the notice required, such mortgagee would have after the time of notice two years before the expiration of the maximum period of three years to redeem. If the purchaser waited two years from the date of sale to give the mortgagee notice as required such mortgagee would have one year to redeem which would equal the three year period allowed the owner. However, if the purchaser at the sale waited until near the expiration of the three year period or a longer period before giving the mortgagee notice the mortgagee would still have the right to redeem within one year from the date of the service of such notice. I trust that this is explicit enough to clear up your difficulty.

The foregoing opinion is predicated upon the presumption that the tax sale was made since the extension of the redemption period from two to three years. If the sale was made under Section 3109 of the Code of 1923 being Section 298 of the Revenue Compilation to which you refer, what I have said in the foregoing with reference to the three year period of redemption would apply equally as to the two year period.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1936.

Hon. Roy Johnson,
Tax Assessor, Jefferson County,
Court House,
Birmingham, Alabama.

The Tax Collector, under the authority of Section 178, may report and have allowed clerical errors, but may not merely report for allowance over-valuation. If the facts are such as, in the opinion of the Tax Collector, constitute a clerical error, he may so report, and if in the opinion of the County Commission they constitute such an error, they may allow the Tax Collector a credit therefor.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Under date of April 11, 1936, you wrote me as follows:

"The Grasselli Chemical Company made their assessment for 1935 and, as you will note from the assessment, wrote thereon that certain buildings had been removed. However, they did not protest and nothing was done about it until the taxes became due.

"I am thoroughly convinced that I do not have authority to make any change in this assessment but as a matter of courtesy to the law firm of Bradley, Baldwin, All & White, who are attorneys for the Grasselli Chemical Company, and at their request, I am writing you for an opinion in this matter."

You attach to your letter a copy of the assessment of the Grasselli Chemical Company for the tax year beginning October 1, 1934 and ending September 30, 1935; (b) copy of the affidavit of which you say the facts stated in the affidavit are correct. You add the following:

"A reduction in this assessment was heretofore allowed to this taxpayer for and on account of certain personal property dismantled and removed from the lands described in this assessment before October 1, 1934. The balance due upon such assessment, including the amount due for and on account of the assessed values of the buildings removed from such lands is the sum of \$1958.48 with interest from January 1, 1936.

"No reduction has been allowed for and on account of the assessed values of the buildings. It appeared to the Board of Revenue of this County upon the facts submitted to it by this taxpayer that substantially all of the buildings on this land had been dismantled and removed before October 1, 1934 and the Board of Revenue authorized me to correct this assessment so as to exclude therefrom the value of the assessment of the buildings theretofore dismantled and removed. I am submitting this matter to you and would be obliged if you would advise me as to my authority and duty in the premises."

The facts stated in the affidavit show that prior to October 1, 1934, a large portion of the buildings on the property of the Grasselli Chemical Company were removed, and that on the return made by the taxpayer a valuation of some \$9,900.00 was placed as the taxpayer's estimate accompanied by the statement to the effect that a large portion of the buildings situated thereon during the previous year had been removed. The previous

year's valuation on the buildings had been \$38,500.00, and this valuation was put in by the tax assessor, apparently overlooking the statement on the return that the buildings, or a portion of them, had been removed prior to the assessment date.

You also attach letter from the State Tax Commission, in which it was stated: "It appears, therefore, that the only way in which this matter can be handled with a view of eliminating any part of the tax is through an allowance as an error." Mr. Curry who wrote the letter does not make the positive statement that the matter is so allowable.

It appears from the entire file that either property was assessed which did not belong to the taxpayer on October 1, or that there was an actual over-valuation of property which did belong to the taxpayer on that date.

Section 178 of the 1935 Revenue Act, provides:

"Section 178. The tax collector shall in each year report on oath to the State Tax Commission at Montgomery, and to the court of county commissioners, or other court of like jurisdiction, at the June term thereof, a list on a form prescribed by the State Tax Commission, of the persons from whom the taxes assessed against them cannot be collected, with the amount of taxes, State and County assessed against each, which shall be termed 'list of insolvents,' and a list of such persons as have been overassessed or wrongfully assessed, with the taxes, State and County assessed against each, which shall be termed 'list of errors in assessments', and any taxes which may be in litigation, in order that the same may be passed upon and determined by the court. The Tax Collector shall cause the said 'list of insolvents' to be published twice during the month of July following the submission thereof to the June term of the Court of County Commissioners or other Court of like jurisdiction. Said publication shall be made in a daily newspaper printed and published in said County; if no such paper is published therein, then in a weekly newspaper published in said County; if there be neither a daily or weekly newspaper of any sort published in said County, then he shall post said 'list of insolvents' in the Court House and in three other conspicuous places in said County and keep said posting available for the public during the entire month of July. A failure to publish said list as here required shall constitute a misdemeanor."

In a lengthy opinion to Hon. R. E. King, Tax Collector of Mobile County, under date of July 28, 1936, the meaning of this section was discussed, and particularly the word "over-assessed." I am enclosing copy of this opinion.

The opinion contains the following conclusion:

"Reading this provision along with the other body of the law and the holding of the Court that an assessment once made final is binding both on the State and the taxpayer, I am of the opinion that the word 'over-assessed' cannot be construed so as to authorize the Tax Collector to revalue property which has been valued and assessed by the proper authorities and the tax year has closed. In fact, except in the matter of escapes, as pointed out, I find no authority for the Tax Collector to assess and value property whatever. To give such a meaning to the word 'over-assessed' would render practically nugatory other provisions of the law for the final assessment and valuation of property which are set out in detail and in extenso and construing which our Supreme Court

has said makes a final and binding assessment both on the State and on the taxpayer.

"The problem thus confronts us as to giving a proper and reasonable meaning to the word 'over-assessed' as used in Section 178. It is to be noted that this word is included in the Section providing for the report by the Tax Collector to the State Tax Commission and to the Court of County Commissioners the following items:

"1. The 'list of insolvents.'

"2. A 'list of such persons as have been over-assessed or wrongfully assessed, which is termed 'list of errors and assessments' and

"3. 'Taxes in litigation.'

"Following Section 178 is Section 179 authorizing the Court of County Commissioners 'to examine such list and ascertain * * * what taxes contained in the list of errors and assessments should not have been collected by him by reason of such errors.'

"From reading the whole of these two Sections, it is clear I think that the words 'over-assessed' or 'wrongfully assessed' are used in practically the same sense and that the only error or errors which the Tax Collector would be authorized to correct are those of a clerical nature. If the rate of taxation was \$2.00 per \$100.00 and the Assessor had erroneously calculated it at \$2.25 per \$100.00 such an error would be clerical and the Tax Collector would be authorized to secure allowance for the excess. Likewise if multiplying the valuation by the correct rate the result was an amount in excess of that properly due, the Tax Collector would be authorized to have an allowance for the excess over the correct amount. There might be a possible case where the Assessor included property not in existence and which fact affirmatively was shown on his records, thus making a greater amount of taxes due than were legally payable. In such cases however, the error must be clerical and not judicial in order for the Tax Collector to secure any allowance therefor."

"I conclude, therefore, that the word 'over-assessed' as used in Section 178 does not authorize the Tax Collector to revalue property but merely authorizes the correction and allowance for clerical errors by which the amount of taxes shown to be due is greater than are legally payable."

The question which, therefore, confronts the Tax Collector is determining whether there was a clerical error on the part of the assessor or an over-assessment in the sense of an overvaluation. If he should conclude that it is a clerical error and report the same to the County Commission for allowance as such and the Commission, upon examination of all the facts, should conclude that it is such a clerical error as is contemplated by Section 178, as so construed, the amount due should be so corrected. If on the other hand, it should be found that there was a mere over-valuation, the amount due should not be changed.

It seems in the last analysis to be a matter for the Tax Collector and the Court of County Commissioners to determine, the construction of Section 178, having been fully discussed in the opinion enclosed.

It does not appear that the Tax Collector has taken any action on this matter, but as you presented the question in so much detail, I have written

fully on the subject, and am sending a copy to the Hon. J. W. Hamilton, Tax Collector of Jefferson County.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1936.

Hon. Frank N. Julian,
Superintendent of Insurance,
Montgomery, Alabama.

Premium Taxes—The term "return premiums" used in Schedules 160.4 and 160.7 of Acts 1935, page 550, as deduction from "gross premiums" does not include either savings or dividends which the companies involved may pay or credit to their policyholders, and such companies in computing and paying the licenses thereby exacted are not entitled to deduct such savings or dividends from gross premiums.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I wish to acknowledge receipt of your letter of July 20th, which is as follows:

"Schedule 160.4 of the Revenue Act, approved July 10, 1935, imposes an annual license tax upon foreign insurance companies doing business in Alabama, based upon "gross premiums" received for business done in this state during the preceding calendar year, less "return premiums".

"Schedule 160.7 of such Revenue Act provides for a similar annual license for domestic insurance companies, based upon the amount of "gross premiums" received for business done in the state during the preceding calendar year less "return premiums".

"Schedule 160.6 of such Revenue Act provides for a similar annual license for each reciprocal or inter-insurance exchange doing business in the state, based upon the amount of premiums received for business done in this state. This schedule further provides:

"In computing said tax such reciprocal exchange shall be permitted to deduct from gross premiums all return premiums and **all savings or dividends to policyholders or credited to their accounts.**" (Emphasis supplied)

"I shall appreciate it if you will be good enough to advise me whether or not, in view of the provisions above quoted, insurance companies other than reciprocal or inter-insurance exchanges, doing business in this state, are entitled, in computing and paying the license levied by Schedules 160.4 and 160.7, to deduct from gross premiums all return premiums and all savings or dividends returned to policyholders or credited to their accounts.

"In this connection I wish to call your attention to an opinion of the Hon. Robert C. Brickell, Attorney General of Alabama, dated December 8, 1911, and addressed to Cyrus B. Brown, Insurance Commissioner, a copy of which I enclose herewith for your convenience. This opinion of Attorney General Brickell apparently held that 'dividends' were 'return premiums' within the meaning of the statutes in effect in

1911, but it would appear that the provisions of the 1935 Act above referred to are materially different from the statutes in effect in 1911."

Since the legislative history of this tax shows so clearly its scope and intent, I shall, at the expense of brevity, review it at length.

The privilege tax based upon premium receipts originated with the Act of 1877, which was embodied in the Code of 1896, Section 2584(a) and provided that all insurance companies should pay one dollar on each one hundred dollars of **gross premiums received in this State**, there being no provision for any deductions of "return premiums" or otherwise.

This provision was amended by Acts 1907, p. 323, raising the rate to one and one-half dollars per hundred on fire companies and to two dollars per hundred on all others, but still with no deductions whatever allowable from "gross premiums".

The Act of 1907 was embodied in the Code of 1907 as section 2089, which was amended by Acts 1909, Special Session, p. 337. Here for the first time the legislature granted a deduction from "gross premiums", the tax being based upon "gross premiums, less return premiums, so received in this State. * * *"

Evidently some confusion must have arisen regarding the meaning of the term "return premiums" provided as a deduction from "gross premiums" under the Act of 1909, and it was with reference to this Act that the opinion of Robert C. Brickell, Attorney General, was written, dated December 8, 1911, and holding generally, without the citation of authority, that "dividends" paid to policyholders were deductible from "gross premiums" as "return premiums" in calculating the tax. This construction placed upon the Act of 1909 by the Attorney General, whether sound or not, was completely and obviously discarded and rendered inapplicable by the Legislature in the next re-enactment of the tax in Acts of 1911, p. 163, section 4, which provides as follows:

"Section 4. Every insurance company, except fraternal, doing business in this State, which files a statement as required by Section 4556 of the Code (1907), shall at the same time pay to the insurance commissioner the following amounts, that is to say: Each fire insurance company shall pay one and one-half dollars on each one hundred dollars of gross premiums received, **less the premiums returned by cancellation**, by it in this state, and every other insurance company shall pay two dollars on each one hundred **of the gross premiums** so received in this state during the year ending on the 31st of December preceding, as a tax for doing business in this state; provided that domestic insurance companies shall pay only one dollar **less said return premiums** on each one hundred dollars of gross premiums so received by it in this state, and any such domestic company paying a tax on its property or shares may deduct the same from this tax. * * * "

Section 36 of that Act, Acts 1911, p. 185, provided that this license provision should become effective on January 1, 1912.

The opinion of Robert C. Brickell, then Attorney General, must of necessity have referred exclusively to revenue act of 1909, above referred to, as the conclusion reached in that opinion is squarely in the teeth of the clear provisions of the 1911 Act which became effective January 1, 1912, and which set out exactly what the term "return premiums" as there used

meant—i. e., premiums returned by cancellation—which is the usual significance of the term.

This tax was re-enacted by Acts of 1915, p. 506, sec. 59(b), in the following language:

"Section 59(b). Each fire or marine insurance company shall pay one and one-half dollars on each one hundred dollars, and every other insurance company shall pay two dollars on each one hundred dollars of gross premiums received by it for business done in this State, less return premiums, whether the same are actually received by said company in this state or elsewhere, during the year ending the 31st day of December preceding, as a tax or license for doing business in this state; * * * "

There was nothing here to indicate a meaning intended by the term "return premiums" different from the more detailed provision of the 1911 Act. The only substantial change here, expressly meeting the adverse decision in *Ex Parte Pittsburgh Life & Trust Co.*, 189 Ala. 413, was to make clear the subjectivity to the tax of premiums on risks in this State whether received here or elsewhere.

It is worthy of note that the Supreme Court in the *Pittsburgh Life & Trust* case, *supra*, held exactly opposite to the opinion of the Attorney General of December 8, 1911, construing the Act in question as applied to premiums paid outside of the State by resident policyholders.

This tax was carried forward in the Revenue Act of 1919, Acts 1919, p. 414, sec. 59(b), the tax being computed on "gross premiums received by it for business done in this State, less return premiums, whether the same are actually received by said company in this State or elsewhere, during the year ending the 31st day of December preceding * * *."

Again there was no indication of legislative intention to change the meaning of the term "return premiums".

The next re-enactment of this tax appears in the Revenue Act of 1927, Acts 1927, p. 149, sec. 3(b), wherein it was provided for the similar license tax on foreign companies at stated rates based upon "the gross premiums received by it or them for business done in this State, less return premiums, * * * " and on domestic companies likewise based upon "gross premiums, less return premiums, received by it for business done in this State * * *."

This re-enactment likewise carries no indication of legislative intention to change or broaden the usual meaning of the term "return premiums" as used in the 1911 Act.

The next re-enactment of this tax appears to have been in the 1935 Revenue Act, Acts 1935, pp. 550, et seq., schedules 160.4, 160.6 and 160.7.

As there re-enacted the provisions are as follows:

"Schedule 160.4. Every foreign fire or marine or fire and marine insurance company shall pay one and one-half dollars (\$1.50) on each one hundred dollars, and every other foreign insurance company, including foreign life insurance companies, shall pay two dollars and fifty cents (\$2.50) on each one hundred dollars (\$100.00) of the gross premiums received by it or them for business done in this State, whether the same are actually received by said company in this State or elsewhere

during the year ending the thirty-first of December preceding, **less return premiums * * ***

"Schedule 160.6. (In dealing with the qualification, operation and licensing of reciprocal or inter-insurance exchanges, the schedule provides in pertinent part) "In addition thereto each reciprocal or inter-insurance exchange writing fire or marine or fire and marine insurance shall pay to the Superintendent of Insurance a premium tax of \$1.50 on each one hundred dollars of premiums collected in the State of Alabama, and each such reciprocal exchange writing other kinds of insurance shall pay a premium tax of \$1.50 on each one hundred dollars of premiums collected in this State. **In computing said tax such reciprocal exchange shall be permitted to deduct from gross premiums all return premiums and all savings or dividends returned to policyholders or credited to their accounts. * * ***"

"Schedule 160.7 (Domestic Companies) * * * Each domestic fire or marine or fire and marine insurance company shall pay one dollar (\$1.00) on each one hundred dollars (\$100.) and each other domestic insurance company, including domestic life insurance companies, shall pay one dollar (\$1.00) on each one hundred dollars (\$100.) of the **gross premiums received by it for business done in this State**, whether the same are actually received by said company in this State or elsewhere, **less return premiums * * ***"

While none of our Acts has been construed in this particular by our Supreme Court, the recital of the legislative history and the precise provisions of the 1935 Act now involved shows so clearly the scope and intent of the language used as not to require the aid of judicial construction. The quoted schedules of the 1935 Act, relating as they do to the same general subject, must be construed together. Taking these three schedules together, it is obvious that in using the term "return premiums" as allowable deductions from "gross premiums" in Schedules 160.4 and 160.7 the legislature did not intend that the term should include "savings" or "dividends" returned to policyholders or credited to their accounts. The legislature was very specific and precise in its treatment of the subject. It created three classes of license, i. e., foreign companies (Schedule 160.4), reciprocal or inter-insurance exchanges (Schedule 160.6), and domestic companies (Schedule 160.7). In Schedules 160.4 and 160.7 it allowed the classes there dealt with the right to deduct from "gross premiums" the amount of "return premiums", and in Schedule 160.6 it allowed the class there dealt with the right to deduct from "gross premiums" the same "return premiums" and in addition thereto **"all savings and dividends returned to policyholders or credited to their accounts."** This is a clear legislative construction that the term "return premiums" as used in Schedules 160.4 and 160.7 did not include any "savings" or "dividends" which such companies might pay to their policyholders or credit to their accounts. In view of what was actually written, to say that the term "return premiums", as used in Schedules 160.4 and 160.7, includes either "savings" or "dividends" either returned to the policyholders or credited to their accounts, would be not only to charge the legislature with vain and useless action, but also to insert into the statute additional provisions not incorporated therein by the legislature. This cannot be done. The statute must be enforced as written.

In the absence of decisions from our own courts construing our statutes in this particular, I might say that courts of other states have considered the question under various statutes, many of which are essentially different

from ours. Perhaps the decision most directly in point here is that of the Supreme Court of California in *Northwestern Mutual Life Ins. Co. v. Roberts, State Treasurer*, 171 Pac. 313. In that case the Constitution of California of 1910, Article 13, Sec. 14 (b), provided:

"Every insurance company or association doing business in this State shall annually pay to the State a tax of one and a half per cent **upon the amount of gross premiums received upon its business done in this State, less return premiums** and re-insurance in companies or associations authorized to do business in this State." (Emphasis supplied)

It will be observed that this provision is almost identical with the pertinent language used in Schedules 160.4 and 160.7. The Court in a long and carefully reasoned opinion held that the term "return premiums" as there used must be confined to that portion of the premium which has been unearned and which insured has the legal right to have returned to him, and that dividends declared and paid or credited to the policyholders of the companies could not be included therein as a deduction from gross premiums.

To similar effect see *New York Life Ins. Co. v. Wright*, 122 S. E. 706 (Ga. 1924); *American Mutual Liability Co. v. Commonwealth*, 122 N. E. 868 (Mass.); *Cochrane v. Nat'l. Life Ins. Co.*, 235 Pac. 569 (Colo. 1925); *New York Life v. Burbank*, 216 N. W. 742 (Iowa 1927). There are, of course, other decisions contrary to these, but consideration shows them not to involve facts or circumstances particularly analogous to ours.

In view of the legislative history and these authorities I therefore hold that the companies subject to the licenses exacted by Schedules 160.4 and 160.7 of Acts 1935, p. 550, in computing and paying such licenses are not entitled to include in the deductions as for "return premiums" any amounts paid or credited to their policyholders as savings or dividends.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1936.

Hon. J. M. Lyon,
Chairman, Board of Revenue,
Shelby County,
Columbiana, Alabama.

Gasoline Tax Fund—The compensation of members of Board of Revenue of Shelby County while acting as road supervisors in their respective districts could not be paid from the gasoline tax fund prior to April 7, 1936, but can be paid from this fund subsequent to that time, under and by virtue of the authority given to the Board of Revenue of Shelby County by Act No. 88 of the 1936 Legislature approved April 7, 1936.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of sometime ago which follows:

"I desire your opinion on the following:

"Shelby County is divided into four Board of Revenue Districts, and one member is elected from each district. The Board of Revenue has

no road supervisors but by a resolution properly passed has designated the members of the respective districts as road supervisor in their district, and each member while acting as such supervisor in his district draws a per diem of \$4.00 for each day spent attending to the duty of supervisor in the construction and maintenance of public roads. Each member also draws a per diem of \$4.00 for each day spent in attending the sessions of the Board of Revenue, all of which has heretofore been paid from the general fund, but which is now greatly depleted.

"The greater portion of pay, or compensation, drawn by the several members of said Board are for days which are spent as road supervisors in the construction and maintenance of the public roads.

"I would like to know if the per diem charge of said members while acting as road supervisors, as aforesaid, would be a lawful charge against the gasoline tax fund, which is derived and paid, as provided for by Schedules 156.09 and 156.11 of the Revenue Code of 1935, or derived from any other levy as now provided by law."

It is my opinion that your inquiry must be answered in the negative up to April 7, 1936 and that thereafter it may be answered in the affirmative.

Act No. 134, Local Acts, 1911, page 154, is the Act creating the Board of Revenue of Shelby County. (This Act was later amended by Act No. 298, Local Acts, 1919, page 115, approved September 10, 1919, in respects not here material). Act No. 21, Local Acts of 1933, approved March 8, 1936, provides that the Board of Revenue of Shelby County may employ a Chief Supervisor of Public Roads, but it also provides that, if the Board of Revenue so desires, the work of supervising the working, maintenance, building and improvement of roads may be done by the members of the Board in their respective districts. You state in your letter that your Board has employed no supervisor but that the members of the Board do this work in their respective districts.

Both the 1911 Act, *supra*, and the 1933 Act, *supra*, provide that the compensation there fixed for the members of the Board of Revenue for the performance of their duties as therein set out shall be paid out of the County Treasury.

The Supreme Court of Alabama, speaking through Mr. Chief Justice Anderson in the case of *Weaver v. Tidwell*, 228 Ala. 169, held that "county treasury" as used in Section 6771 of the Code of Alabama of 1923, as amended by General Acts of Alabama, 1931, page 805, which is the general law dealing with the compensation of members of Courts of County Commissioners and Boards of Revenue, meant the general fund of the County, and that consequently the compensation of members of such boards, operating under the general law, could not be paid out of the gasoline fund, even while they were engaged in supervising the maintenance and construction of roads in their respective districts.

Following the reasoning and holding of the Court in that case I conclude that the per diem of the members of the Board of Revenue of Shelby County while acting as road supervisors in their respective districts could not be paid from the gasoline tax fund prior to April 7, 1936.

However, on April 7, 1936, a Local Act for Shelby County was passed. This is Act No. 88 of the 1936 Legislature. This Act gives to the Board of Revenue of Shelby County the authority to use so much of the gasoline tax fund as may be necessary to pay the compensation of members of the Board of Revenue of Shelby County while acting as road supervisors for said

county in their respective districts as is now provided by law. Since the gasoline tax fund is derived from legislative act, the legislature has the power to regulate the use of the same. The Legislature, having provided on April 7, 1936, as shown above, that part of the proceeds from this fund allocated to Shelby County could be used for the purpose of paying the compensation of members of the Board of Revenue of Shelby County while acting as road supervisors in said County for their respective districts, the same can now legally be used for this purpose. Therefore, I advise you it is my opinion that subsequent to April 7, 1936, the compensation of the members of the Board of Revenue of Shelby County while acting as road supervisors in their respective districts can properly be paid from the gasoline tax fund.

I call your attention to the fact that Act No. 88, supra, only provides for payment of the compensation of members of the Board of Revenue out of the gasoline tax fund while they are acting as road supervisors in said county for their respective districts. Their compensation for performing any other of their official duties as members of said board could not be paid from this fund.

Nothing herein contained is to be construed as expressing an opinion as to the legality or constitutionality of those parts of the 1911 Act, supra, and 1933 Act, supra, which fix the amount of the compensation of the members of the Board of Revenue of Shelby County for the performance of their duties as therein set out.

The opinion heretofore rendered to you on this matter on July 27, 1936, is hereby overruled and withdrawn and this opinion is hereby substituted therefor.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 19, 1936.

Hon. Henry A. Teel,
County Solicitor,
Rockford, Alabama.

Justice of Peace jurisdiction under Revenue Act of 1935.

Schedule 158.16 of Section 348 (General Acts 1935, p. 526) confers jurisdiction on justices of the peace only to try such violations as are set out in this Act.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 7, 1936, in which you request my opinion as follows:

"Sections 48 and 49 of the Alabama Highway Code, Acts 1927, page 365, deal with driving while intoxicated and with reckless driving of motor vehicles. The violations of these two sections are made misdemeanors.

"It is clear that the County Courts have jurisdiction of these offenses. However, some question has arisen here as to whether justices of the peace have preliminary or final jurisdiction of such violations where the warrants are made returnable before the justices of the peace.

If your office has heretofore considered that question, I should like to have your views respecting it.

"As authority for such final jurisdiction by justices of the peace, my attention has been called to the last sentence of schedule 158.16, Acts 1935, page 527. The sentence reads as follows:

"Justices of the peace and inferior courts with like jurisdiction shall be authorized and shall have jurisdiction for violation of the motor vehicle laws except in the case of felonies."

Answering your request I am of the opinion that Schedule 158.16 of Section 348 (General Acts 1935, page 523) where it says:

"Justices of the peace and inferior courts with like jurisdiction shall be authorized and shall have jurisdiction for violation of the motor vehicle laws except in the case of felonies,"

does not refer to any other offenses except those set out in the Act, of which Schedule 158.16 of Section 348 is a part.

As to the jurisdiction of justices of the peace to try other violations of the Highway Code, I call your attention to an opinion of this office written July 3, 1935, to Hon. Chas. W. Lee, State Comptroller, Capitol, Office Edition, Opinions of the Attorney General Book 5-A, p. 13, copy of which opinion I herewith enclose.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 19, 1936.

Hon. J. A. Keller,
Superintendent of Education,
Capitol.

County Board of Education—Authorized to reimburse Federal disbursing officer for certain supplies furnished on CWA project at request of agent of County Board of Education under facts stated.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have before me your request for opinion as to whether the County Board of Education of Jefferson County may properly reimburse the Federal disbursing officer, Mr. J. W. Yates, Jr., for a certain sum charged to him as a result of the purchase of a formula to be used in connection with a CWA project in Jefferson County. I also have before me the complete file in this matter and an examination of same reveals the following facts:

That during 1933 it was agreed between the Jefferson County Civil Works Administration and the Jefferson County Board of Education that the former should furnish the necessary labor and all supplies incident to the completion of project No. 37-348-3, which consisted of cleaning up and making certain repairs to the Jefferson County school buildings. The Board of Education was to furnish the necessary supervision and any transportation cost which might result. J. W. Farris, Assistant Superintendent of Education, was placed in charge of the work on said project by the Jefferson County Board of Education, and under date of December 18, 1933, authorized

David B. Berry of Birmingham to furnish a formula for use in cleaning the school buildings, this formula being known as Cornell's formula.

In the course of the flow of work the local purchasing department of the CWA received a notice of this order, and prepared in confirmation a purchase order in favor of Mr. Berry. Later this bill was properly vouchered and presented to the disbursing officer and payment of same was made under date of January 5, 1934, by check No. 50595 in the amount of \$50.00. This amount was subsequently suspended from the accounts of Mr. Yates when audited in the General Accounting Office, and immediately upon receipt of this suspension effort was made to effect recovery of this amount from the Jefferson County Board of Education. The Jefferson County Board of Education expressed a willingness to pay this sum, but out of an abundance of precaution desisted in doing so until an opinion of this office should be rendered declaring the legality of such procedure.

In my opinion, the County Board of Education of Jefferson County may lawfully reimburse the disbursing officer, Mr. J. W. Yates, Jr., for the expenditure made as detailed above.

The County Board of Education is invested with the authority to contract with reference to the expenditure of the public school funds of a county for school purposes, such as the cleaning and repairing of the school building. **Section 132, Alabama School Code, 1927.** The County Board, therefore, had the legal right to purchase the materials for use in such cleaning and repairing—in particular, the Cornell formula.

It appears that Mr. Farris was the authorized agent of the Jefferson County Board of Education and that the formula in question was furnished at his request; that it was accepted and used for legitimate purposes, the county deriving a decided benefit from its use at no other expense.

I call your attention to the case of **Greeson Manufacturing Co. v. County Board of Education**, 217 Ala. 565, 117 So. 163, wherein the doctrine was announced that the validity or invalidity of such a transaction does not necessarily rest upon the strict and exclusive compliance with the statutory requirement as to the manner of its execution. The Court here concludes as follows:

"The material was furnished, accepted, and used, however, for legitimate purposes entirely within the scope of the County Board's authority, and it, therefore, becomes its duty to reimburse plaintiff therefor not by virtue of the contract, but from 'the general obligation to do justice which binds all persons, whether natural or artificial.'"

I quote further from the Greeson Manufacturing Co. case for your convenience:

"Plaintiff's right of recovery does not rest upon the contract, but from the general obligation to do justice and upon a promise implied by law growing out of the use of the material by the board for legitimate, authorized purposes. This question was fully and ably discussed by this court in *Allen v. Int. of La Fayette*, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497. In that case the town had borrowed money and issued warrants for a repayment thereof, but without authority of law. The funds had been used, however, for the lawful and duly authorized purpose of purchasing a schoolhouse. Speaking to this situation and as pertinent to the question here presented, the court said:

"The warrants in the hands of Mrs. Frederick are as if they were not, and had never been. Neither the municipality of La Fayette, nor any of its officers, or agents, is under any obligation, legal, equitable, or moral, to pay those warrants, or to fulfill the contract out of which they sprung. But, back of that contract, and back of those warrants, there is, on the facts presented by the bill, and accentuated by the answers, not only a moral, but a legal liability resting on the municipality of La Fayette and on its officers, to repay the money which came from Mrs. Frederick, and has been used by the corporation for authorized corporate purposes. In other words, the town of La Fayette is liable, as upon an implied assumpsit, not under, but wholly apart from the unauthorized contract, and not for the amount its officers borrowed from Mrs. Frederick, but for the amount of her money which they received and applied to the purchase of a house, which the charter authorized them to buy, and the town to hold, which was reasonably necessary to the exercise and performance of expressly granted and imposed functions and duties and which the use of her funds had enabled the corporation to acquire and devote to its legitimate purposes."

"The opinion also quotes with approval the following from the California Court (*Argenti v. City of San Francisco* 16 Cal. 255):

"The doctrine of implied municipal liability applies to cases where money or property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or, if used by her, to render an equivalent to the true owner, from the like general obligation; the law, which always intends justice, implies a promise."

The premises considered and in view of the fact that the county received the use of the formula for legitimate authorized purposes, it is my opinion that it may properly reimburse the disbursing officer for the expenditure under the facts stated.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 20, 1936.

Hon. J. C. Pattillo,
Clerk of the Circuit Court,
Clanton, Alabama.

1. Where a convict is sentenced to hard labor for the fine and cost and the cost is paid to the officers and witnesses under Section 3667, Code of Alabama of 1923, and the defendant later pays the cost, the same must remain in the State Treasury to the credit of the Convict Department.

2. The Clerk is entitled to commissions on all moneys transmitted to the State.

3. Where money is paid to the County Treasury it should go to the State, said payment being made by mistake or through a misinterpretation of the law, this money should be returned to the Clerk and the same transmitted to the proper custodian.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 20, 1936, in which you request my opinion as follows:

"Please render me your official opinion on the following statement of facts:

"Will Kennedy was convicted in the Circuit Court of Chilton County, Alabama, for the offense of Violating the Prohibition Law and was fined \$50.00 and costs of court, besides additional hard labor of six months imposed by the Court. No part of the fine and costs was paid and the defendant was duly sentenced to twenty days for the fine, sixty-seven days for the costs and the six months additional hard labor, a total of six months and 87 days. On December 12, 1935, said defendant began serving and served until January 9, 1936. On January 9, 1936, a friend of the defendant paid to me, as Clerk of the Circuit Court, the full amount of the costs in this case, the same being \$49.85, and I am informed that this information was conveyed to the Governor and this defendant was paroled.

"Under Section No. 5518 of the Code of 1923, I disbursed to the State Treasurer, the solicitor's fee of \$30.00, less my 5% commissions, and also under the law, I disbursed to the State Treasurer and the County Treasurer, each, one-half respectively of the trial tax, less my 5% commissions, and also disbursed to myself and to the sheriff the respective clerk and sheriff fees and to the witnesses the witness fees due. After disbursing the costs in this manner the State mailed me a check for \$11.55, in payment of or refunding court costs under Section No. 3667 of the Code and I mailed to the State Board of Administration my check for this amount. It is the contention of the State Board of Administration that they are entitled to all of the court costs in this case and it is my contention under the law, that it is my duty to disburse this in the way the law says I must, as I have referred to above. The State Board of Administration refers me to 1928-1930 Opinions of the Attorney General, page 537, as authority to pay them all the costs in this case.

"It will be observed from the above state of facts that the defendant served something less than one month at hard labor, and as to whether this time he served will be given credit toward the costs or fine, I am not informed, but in any event he has not served sufficient time to pay the costs which was sixty-seven days.

"The first question I would like for you to advise me, is whether or not under the law and under the above facts, it is my duty to pay the solicitor's fee to the State Treasurer, as provided by Section No. 5518 and one-half of the trial tax each to the State and County Treasurers, as the statute provides and the Clerk's, Sheriff's and witnesses' fees to the respective parties, or to pay all of this cost to the State Board of Administration.

"If you hold that it is my duty to pay this cost to the State Board of Administration, then will you please advise me whether or not I am entitled to deduct 5% commission from the solicitor's fee and trial tax as the law provides when the same is paid to the State and County Treasurers.

"If you hold that this money should have been remitted to the State Board of Administration, then will you please advise me if the State and County Treasurers will be authorized under the law to pay back to me this money so paid to them?

"As to my authority in receiving the money, I refer you to the case of *State v. Jordan*, 23, Ala. App. 127, 122 So. 185."

Answering your first request it is my opinion and this office has so held that if the defendant is sentenced to hard labor to pay fine and cost and the State has paid the cost under Section 3667, Code of Alabama, 1923, and the defendant has been delivered to the State and has begun his service then if the defendant comes in and pays the cost, this cost goes to the State Treasury and is placed to the credit of the Convict Department, Quarterly Report of Attorney General, Volume 3, page 188. I am enclosing you a copy of this opinion.

Answering your second inquiry as to your commissions when transmitting money to the State I call your attention to the General Acts of 1931, page 669 (Code Supplement 1936, Michie, Sec. 7278 (1)) which is as follows:

"Section 7278 (1) FEES OF CLERK AND REGISTER FOR COLLECTION OF MONEY.—The Clerks and registers of the several circuit courts of the State of Alabama shall receive five per cent of any sum or sums collected by such clerk or register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such clerk or register making the collection from such sum or sums collected."

I think under the above section you are entitled to your commissions on all moneys transmitted by you to the State or any department of the State.

Answering your third request it is my opinion if you have paid this money to the County Treasury through mistake or misinterpretation of law that the County Treasurer is authorized to reimburse you so that the money may be sent to the proper custodian.

The court of county commissioners or other governing body of the county should order the treasurer to pay this sum in accordance with the foregoing opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 20, 1936.

Hon. Vernon L. St. John,
Member of Senate,
Second District,
Town Creek, Alabama.

Constitution—Amendment authorizing five-mill additional Ad Valorem tax on vote of people in Town Creek school district No. 59 pur-

posed by an Act, 1923, (General Acts, 1923, page 751) and for claims ratified November 15, 1924 (by Proclamation Record D, page 107) authorizes the use of the proceeds of such tax for installation of permanent equipment such as desks or chairs, work tables, wood and blacksmith shop, stoves and sewing machines.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 28, 1936, in which you request my opinion as follows:

"The Town Creek school district, number 59, in Lawrence County, has a five-mill school tax above the constitutional limit, levied about 1923.

"With the proceeds of this tax we have constructed a new Vocational Agriculture and Home Economics building. To make this building useful and complete, it will be necessary to place in it some permanent equipment such as desks or chairs, work tables, wood and blacksmith shop equipment, stoves and sewing machines.

"Please give me your opinion as to whether this special tax money could be used in placing this permanent equipment in the building."

An examination of the order of the Board of Revenue declaring the election and levying the tax reveals that a special election was held on the 20th day of January, 1925, and that the election resulted in a favorable vote for the proposed taxation. It appears that the election was held and that the tax was voted for the purpose of "acquiring, constructing, or repairing of school buildings" in school district No. 59, Town Creek.

In my opinion, Amendment No. XX, ratified November 15, 1924, authorizes the use of the proceeds of the tax above mentioned for the equipment of the Vocational Agriculture and Home Economics Building in Town Creek, district No. 59 with desks, chairs, work tables, wood and blacksmith equipment, stoves and sewing machines.

I call your attention to an opinion rendered to you under date of March 7, 1936 (Quarterly Report, Attorney General, Vol. II, page 279) in which it was held that "the word 'construct' implies the fitting of an object for use or occupation in the usual way and for some distinct purpose." *Paterson etc. Ry. Co. v. Paterson*, 86 Atl. 68 (N. J.) 12 C. J. 1295 n. 27. See also *Plymouth Graded School District v. Pruden*, 103 S.E. 369 (N. C.)

It is my opinion, therefore, and I so advise you, that desks, chairs, work tables, wood and blacksmith shop equipment, stoves and sewing machines, when attached to the building in a permanent manner as detailed by you, necessarily comes within the above definition of the term "construct", inasmuch as it could not be said that a Vocational Agriculture and Home Economics building was "fitted for use or occupation in the usual way" in the absence of the machinery and equipment which are the necessary essentials to effectuate the purpose for which the building was designed. See especially, *Alabama Great Southern Ry. Co. v. Reed*, 124 Ala. 253, 259, holding that the authorization to levy a tax to erect a court house includes and confers the authority to provide for furnishing it with suitable furniture.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 21, 1936.

Hon. Hodges Crow,
Tax Collector,
Morgan County,
Decatur, Alabama.

Tax Collector—Notice of sale of property for taxes must be published in accordance with the provisions of Section 224 of the 1935 Revenue Act, which provides that description of property to be sold must be given.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of recent date, which follows:

"Will Tax Collectors be permitted to advertise 1935 Real Estate for sale by printing the name of the owner, the tax and cost and the printer's fee, omitting a complete description of the land? For example—Joe Doe—Tax & Cost \$50.49; Printer's Fee \$1.40?"

I assume that you refer to the notice which you are required to give after the Judge of Probate has entered a decree of sale of property for taxes.

The notice which you are required to give in this case must be in accordance with the provisions of Section 224 of the 1935 Revenue Act. Section 224 reads as follows:

"Section 224. Immediately at the end of any term of court at which any decree for sales of real estate for the payment of taxes are rendered, or as soon thereafter as practicable, the tax collector shall proceed to enforce such decree by sales of real estate ordered to be sold, and to this end shall give notice for thirty days before the day of sale, by publication for three successive weeks in some newspaper published in the county, or at least three (3) weeks before the day of sale shall post a notice at the courthouse of his county, and at some public place in the precinct in which the real estate is situated, that at the time specified therein, he will proceed to sell such real estate separately, **describing such portions as are embraced in each decree** and stating the amount for which each decree was rendered (without stating the items of which each decree is composed) and the person against whom the taxes embraced in such decree were assessed, or if assessed to 'Owner Unknown', stating that fact. The rate to be charged for publishing such notice in a newspaper shall not exceed one and one-half cents per word for the first insertion, and one cent per word for each subsequent insertion; but no allowance shall be made for the publication of any matter other than is required by law; and if no newspaper is published in the county, or if the publication of the notice cannot be had in the county at the above rate, the posting of such notice at the courthouse and at a public place in the precinct in which the real estate is situated, as required by this section, shall be sufficient notice of such sale." (Emphasis supplied).

You will note that this Section provides among other things that all such portions as are embraced in each decree of sale shall be described in the notice. Therefore, it is my opinion that you must describe each portion of property which is to be sold for taxes in your notice and that you could not give notice merely by giving the name of the party and the amount of the taxes. This notice should be given in strict conformity with the provisions

of Section 224, supra, which, as pointed out above, requires that a description of the property to be sold must be given.

As to the kind and nature of the description required to be given in your notice of sale, as provided by Section 224, supra, I refer you to the provisions of Sections 215 and 226 of the 1935 Revenue Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 25, 1936.

Hon. Walter K. McAdory,
Chief, Alabama Highway Patrol,
Capitol.

In the Inferior Court of Autauga County where the offense charged is one in which Justices of the Peace would have jurisdiction and a plea of guilty is made no solicitor's fee can be charged.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 7, 1936, in which you request my opinion as follows:

"Autauga County has a Court known as the Civil and Criminal Court, which is in lieu of all Justice of the Peace Courts in that Precinct.

"This Court having jurisdiction in lieu of Justices of the Peace in that precinct, should a Solicitor's fee be charged to the defendant when convicted of a misdemeanor relative to the Highway Rules of the Road and Driver's License Act?"

My answer to your request is in the affirmative, that is, where a trial is had and the defendant convicted. I call your attention to Section 17 of Act approved July 8, 1935 (Local Acts of Alabama of 1935, page 82). This Act establishes the Inferior Court of Autauga County and Section 17 referred to above is as follows:

"In all criminal cases in said Court there shall be taxed a Solicitor's fee as provided in this act, but in cases which are within the jurisdiction of the Justices of the Peace there shall be no Solicitor's fee charged when the defendant pleads guilty."

The deputy solicitor of Autauga County is required to appear in said Court and prosecute all criminal cases. Sections 7 and 8 of the Act, supra, are as follows:

"Section 7. That the Solicitor of said Court shall be appointed by the Circuit Solicitor of the Circuit of which Autauga County is a part, and shall hold office at the pleasure of the Circuit Solicitor, and the Solicitor of said Court shall attend said Court and shall prosecute all criminal cases in said Court and perform such other duties as are required by law of Autauga County, or deputy solicitors in counties where the County Courts have not been abolished."

"Section 8. That the said Solicitor of said Court shall receive compensation for his services the sum of Seven Hundred and Twenty Dollars

per annum, payable in twelve equal monthly payments of Sixty Dollars per month, payable out of the General Fund of Autauga County, Alabama, upon the warrant of the Judge of Probate drawn by him on County Treasurer or Custodian on the first day of each month, after the passage and approval of this Act."

You will note the Act creating Inferior Court of Autauga County, Section 17, supra, has the following provision:

"But in cases which are within the jurisdiction of a Justice of the Peace there shall be no solicitor's fee charged when defendant pleads guilty."

So there is no solicitor's fee charged in cases in which Justices of the Peace have jurisdiction where there is a plea of guilty but if the defendant does not plead guilty and is convicted then such fee attaches and should be collected as other costs.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 25, 1936.

Mrs. Frank C. Turner,
Judge of Probate,
Washington County,
Chatom, Alabama.

Licenses—Under facts stated Probate Judge not authorized to issue the required license upon the payment of the difference between the cost of the license taken out and the license required.

Opinion by Assistant Attorney General Kohn.

Dear Madam:

I wish to acknowledge receipt of your letter of August 11, 1936, in which you request my opinion as follows:

"If a person who buys a saw-mill license under schedule 123, License Code, for a saw-mill, and gives the capacity of the mill less than he really operates under, say he buys a license for a mill cutting less than 5 M. ft. a day and the license inspector later finds out that he is operating a 10 M. cap. mill and cites him for the 10 M. cap. mill, do you think it legal or right for the Probate Judge to issue to him a license for the difference between the prices of the two licenses, for instance a 5 M cap. mill carries a \$15.00 license and a 10 M. cap. mill carries a \$37.50 license, could we issue him a license for \$22.50 which is the difference between the price of the two licenses, I can not find anything in the Rev. Code giving me this authority. It occurs to me that he would have to be cited for either one or the other capacity mills, and not for an additional sum, in other words could I accept the \$22.50 plus the 15% penalty and \$1.50 license inspector citation and issue him a 10 M. ft. capacity mill license? I would appreciate very much this opinion at an early date as I have a few cases like this on file in my office right now."

In my opinion you do not have authority to issue the license for the mill operating at a capacity of more than five thousand and not exceeding ten thousand feet per day upon the payment of the difference between the

cost of the license for a mill operating at a capacity of five thousand feet per day and the cost of the license for a mill operating at a capacity of more than five thousand and not exceeding ten thousand feet per day, as each license is separate and distinct and the amount paid on the lower license cannot be used as a credit on the amount required to be paid for the higher license.

The license inspector should cite the mill owner for the current license, irrespective of the license already procured.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 25, 1936.

Hon. R. H. Williams,
Judge of Probate,
Marshall County,
Guntersville, Ala.

Taxation—Redemption—

1. Party holding mortgage on property sold to the State for taxes more than four years prior to the application to redeem, cannot redeem under Section 291 without payment of interest and penalties even though notice of sale was not actually served on such mortgagee.

2. Such person can redeem under Sections 268 and 269 at any time before the title passes out of the State.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of August 7 in which you state that a party in your county held a mortgage on real estate which was sold to the State for taxes on June 20, 1932; that the mortgagee was not advised of such sale and now desires to redeem, claiming that because notice of the sale was not served, she is entitled to redeem under Section 291 of the Revenue Act of 1935 without payment of interest and penalties even though the four year period allowed for such redemption by such section has expired.

It is my judgment that the limitation of four years placed in 291 is absolute and unconditional and that there is no authority to extend such period.

I call your attention to opinions in Quarterly Report Vol. I, pages 207 and 331; Quarterly Report, Vol. II, pages 205 and 249.

Of course, the mortgagee or any other person entitled to redeem has, under Sections 268 and 269, the right to redeem at any time before the title passes out of the State.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 25, 1936.

Hon. J. M. Yielding,
Treasurer, Jefferson County,
Birmingham, Alabama.

County Commission—Where Sheriff is paid on a salary basis, and the County Commission contracts with a person to act as chef of the county jail at a fixed monthly salary, there is no authority for the county to pay such person subsequently in addition to his fixed salary, the excess over such amount as the State paid to the county for preparing and serving the food for State prisoners in the county jail.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Under date of July 23, 1936, you wrote me as follows:

"It has come to my attention that during October, 1935 I paid a claim which had been approved by the County Commission in the amount of \$2,875.85, that was filed with the Commission by a Mr. John L. Lunsford, who had served from December 26, 1931 to January 15th, 1935 as Chef of the County Jail.

"This claim was based on the contention, by Mr. Lunsford, that whereas the County paid him a salary of \$125.00 a month, which was subsequently reduced to \$91.13 a month, and whereas the State was paying the County at the rate of \$6.00 a day for preparing and serving food to State prisoners confined in the County Jail, he claimed that he was entitled to the difference between what the County paid him in salary and what the State allowed the County by virtue of Section 3 of Act No. 596, General Act of 1927.

"The County Attorney in May 1935 recommended to the County Commission that Mr. Lunsford's claim be disallowed, and the Commission at that time did disallow it. However, in October 1935 the County Attorney recommended that the claim be paid, and at that time the Commission allowed it, and ordered it paid.

"I should like to get your advice on the following questions:

"1—Was the allowance of this claim legal?

2—If you hold that it was not legal, would I be protected from any liability to the County by virtue of the fact that the claim was allowed upon the recommendation of the County Attorney, as provided in Act 414, General Acts of 1931, page 512-513?"

I wrote you under date of July 25, requesting that you send me copy of the County Attorney's opinion.

In a letter dated "July 10, 1936" which apparently meant August 10, 1936, as the letter was received in this office August 12, 1936, you replied:

"In further reference to my letter of July 23, 1936, and to your acknowledgement, dated July 25th, I wish to advise that the County Attorney did not render an opinion in connection with the John L. Lunsford claim. He ok'd Mr. Lunsford's claim and initialed it in pencil without any written or recorded oral opinion.

"In view of the above, I would appreciate your advice in answer to my two questions in my letter of the 23rd."

In reply, I beg to advise that Section 3 of Act No. 596, approved Sept. 6, 1927 (Acts 1927, p. 694) provides:

"Section 3. That section 5 of an Act entitled 'An Act to regulate the feeding of prisoners in county jails; to provide the manner and method of payment therefor', approved September 29th, 1923, be and the same is hereby amended so as to read as follows: Section 5. That the sheriffs who are on a salary basis by virtue of an amendment to the Constitution of Alabama shall not receive the allowance as provided for in this Act for the feeding of prisoners and preparing and serving such food, but such allowance as provided herein shall be paid into the County Treasury, and the Board of Revenue or Court of County Commissioners or other courts of like jurisdiction of such county shall be required and it shall be their duty to furnish the sheriffs of such county with the help necessary for the preparing and serving such food, and shall pay for same out of the county treasury of such county. The selection of such help to be made by the Sheriff of such county."

It will therefore be seen that the Sheriff of Jefferson County being on a salary basis, all amounts received from the State for feeding prisoners and preparing and serving food thereto, are payable into the County Treasury, and it is the duty of the County Commissioners to furnish the Sheriff with necessary help to serve such food.

By Act No. 271 approved June 16, 1931, the County Commission was created and its powers and duties were prescribed.

By Act No. 173, approved April 22, 1931 (Acts 1931, p. 247) it was provided in part:

"* * * That the County Commission in such counties shall designate the number of deputies, clerks, assistants, agents and employees in all county offices and departments and shall fix the compensation of each.

"Section 6. That the County Commission of such counties shall have the power and authority to pay the salary of any county employee or employees out of any County fund which they may deem proper."

It appears from your letter that the county employed a certain person at a fixed salary as chef of the county jail at a fixed monthly salary; and that such party subsequent to such employment filed claim for the difference between the salary as fixed and the amount paid the county by the State for preparing and serving food to State prisoners in the county jail, and that such claim was paid.

In my judgment the payment was erroneous. The County Commission was authorized to fix the salary, which it did. I can read nothing in the Acts or in the facts stated by you entitling the party to greater compensation than that fixed. The fact that the County drew more from the State than was paid to the party does not alter his contract of employment.

As to the authority of the county to make such additional allowance, I call your attention to Section 68 of the Constitution providing:

"Section 68. The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant **any extra**

compensation, fee, or allowance to any public officer, servant, or employee, agent or contractor, after service shall have been rendered or contract made nor to increase or decrease the fees and compensation of such officers during their terms of office; nor shall any officer of the state bind the state to the payment of any sum of money but by authority of law; provided this section shall not apply to allowances made by commissioners' courts or boards of revenue to county officers for ex officio services, nor prevent the legislature from increasing or diminishing at any time the allowance to sheriffs or other officers for feeding, transferring, or guarding prisoners." (Emphasis ours)

In reply to your last question, I refer you to opinion to Hon. M. V. Henry, County Treasurer, Jefferson County, under date of October 28, 1931. This opinion should be in the files of your office.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 25, 1936.

Hon. F. M. Shamblin,
Sheriff, Tuscaloosa County,
Tuscaloosa, Alabama.

Deputy Sheriff who is not on a salary would be entitled to what is known as informer's fee where conviction is had in cases involving distilling and possession of stills.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 8, 1936, in which you request my opinion as follows:

"During the last session of the legislature a bill was passed placing me on salary No. 93 S-127, Tucker.

"The question has come up now as to who is entitled to the seizure fee in Distilling and Liquor cases. If I have a deputy Sheriff who is not on salary and he furnishes the information leading to the capture of a still and Distillers could he be paid the informers fee of \$50.00 or \$25.00 as the case might be?

"However under section 6 of the above bill it states that the Deputy Sheriff of this type cannot be paid by the County. Can he be paid this Seizure fee by the State?

"Under the bill placing the Sheriff of Jefferson County on salary which is practically like this one any Deputy Sheriff gets a still and the Distiller is convicted he is paid this seizure fee whether he is on salary or not."

It is my opinion that such deputy sheriff as you describe above would be entitled to the informer's fee, on conviction, under Sections 4656 and 4657, Code of Alabama, 1923. I call your attention to an Act of the Legislature, approved April 20, 1933 (General Acts, 1933, page 200). This Act changes the amount paid for this service and in this connection I also call your attention to an opinion of this office, construing this Act, written March 19,

1934, to Hon. R. B. Ford, Sheriff of Randolph County, Biennial Report of the Attorney General, 1932-34, page 533.

This office has held that when the Sheriff or deputy is on a salary, such officer would not be entitled to this fee. In this connection, I call your attention to an opinion of this office, written to Hon. John D. McNeel, State Comptroller, under date of March 25, 1935, (Office Edition, Bk. 3-A, page 62).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 25, 1936.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Licenses—War Veteran entitled to exemption of \$25.00 on privilege license for only one business or occupation.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of August 19, 1936, in which you state:

"A party who says he is eligible for the exemption allowed War Veterans, has applied for a privilege license in this County. He states that he was granted a War Veterans License under a different Schedule in Montgomery County but has moved here now.

"Will you give me an opinion as soon as possible as to the following:

"May a War Veteran who has been granted an exemption in one County on a Privilege License, move to another County in the same tax year and secure the Exemption on a different line of business in the new County."

In my opinion, your question should be answered in the negative. The statute specifically confines the exemption granted to one business or occupation.

I refer you to Section 3 of Act No. 494, S. 348, approved September 13, 1935 (General Acts 1935, page 1058) which is as follows:

"Section 3. That each such person who shall engage in, or carry on, any business or occupation as a means of livelihood through the personal efforts of such person or through the personal efforts of such person and not more than one employee, helper, or apprentice, for which business or occupation a license tax is prescribed by or for any County of Alabama, shall be entitled to a license from such county to so engage in, or carry on, such business or occupation, upon payment of the license tax so prescribed, less all, or such portion of, such license tax as shall not exceed Twenty five Dollars (\$25.00); **provided, however, that no such person shall be entitled to the prescribed deduction or commutation in respect of more than one business or occupation for which a license tax is prescribed by law.**"

I refer you to Biennial Report of the Attorney General 1932-34, page 79, in which the Veterans Act approved July 2, 1931, is construed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 26, 1936.

Hon. Festus M. Shamblin,
Sheriff, Tuscaloosa County,
Tuscaloosa, Alabama.

Under an Act of the Legislature approved April 7, 1936, Local Acts 1936 Extra Session, page 56, Sheriff of Tuscaloosa County is not required to collect from the County fees coming to him out of the general fund of the County, and which must be paid back into the Treasury and into the same fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 19, 1936, in which you request my opinion as follows:

"During the last session of the State Legislature an act was passed placing me on salary. No. 93—S—127 Tucker. Under section 8 of the bill it states that the Sheriff shall continue to collect all legal charges, costs, fees, compensation and allowances heretofore or hereafter authorized to be collected by him and shall pay same into County Treasury.

"Does this mean that I shall collect for attendance on court from the county and pay this back into the County Treasury? Shall I collect \$3.00 per diem and \$2.00 per day for each guard for removing insane prisoners from the county and then pay this back into the County Treasury? Shall I continue to collect Ex-Officio Fees and Fine and Forfeiture from the county and pay it back into the County Treasury? As you see this is a lot of extra bookkeeping for nothing, also work, time and expense. Is it necessary for me to collect any bill due me from the county that will have to be paid back into the County Treasury?"

In answering your request, permit me to say the law is supposed never to require of a person the performance of an unreasonable and unnecessary act or service. Therefore, it is my opinion that you are not required to collect the fees you mentioned in your request from the County and at the same time turn right around and pay them back to the County Treasury to the credit of the fund you collected from. It is true, as you say under Section 8 of an Act approved April 7, 1936, Local Acts 1936 Extra Session, page 56, you are required to collect all fees etc. and pay the same into the County Treasury, but I think it is clear that the legislative intent is that you collect all fees other than those paid by the County and pay these fees at the end of each month into the County Treasury.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 28, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Costs—The item of cost which appears in Section 3667, Code of Alabama, 1923, where it says, cost of committing magistrate and constable or preliminary trial, both together not to exceed \$5.00, includes all of the cost of preliminary hearing and not merely the cost of the committing magistrate and constable.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 17, 1936, in which you request my opinion as follows:

"You are respectfully requested to compare the following Code sections and render an opinion regarding, viz:

"Code of Alabama 1896, Section 4511, page 213—

"'and costs of committing magistrate and constable on preliminary trial, both together not to exceed \$5.00.'

"Code of Alabama 1907, Section 6572, page 413—

"'costs of committing magistrate and constables or preliminary trial, both together not to exceed \$5.00.'

"Code of Alabama 1923, Section 3667, page 176—

"'costs of committing magistrate and constables or preliminary trial, both together not to exceed \$5.00.'

"In both the Code of 1907 and 1923 the wording is changed from 'on preliminary' to 'or preliminary' which very materially changes the meaning of this portion of this section. Kindly advise me what, in your opinion, is the correct interpretation of this part of Section 3667 of the Code of 1923."

Answering your first inquiry, the Code of 1896, Section 4511, reads as follows:

"and costs of committing magistrate and constable on preliminary trial, both together not to exceed \$5.00."

This clearly means that the cost of the committing magistrate and constable on preliminary trial separate and apart from all other costs can be paid up to and including \$5.00.

Code of 1907, Section 6572, seems to have changed the wording and instead of saying

"and costs of committing magistrate and constable on preliminary trial, both together not to exceed \$5.00."

says,

"costs of committing magistrate and constable or preliminary trial, both together not to exceed \$5.00."

You can see it changed the word "on" where it appears in Section 4511, Code of 1907, to the word "or" and we find this is carried forward in the Code of 1923, in Section 3667.

It is my opinion this Section as it now appears not only includes the cost of the magistrate and constable but must include all of the cost of the preliminary examination. I do not think as suggesetd by some that this change is a misprint as it appeared in the Code of 1907 and then again in the Code of 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 28, 1936.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Redemptions—Valuation by Tax Assessors—

1. It is the duty of the tax assessor on redemption to fix the valuation for each of the years subsequent to the year for which the land was sold to the State for taxes.
2. Upon appeal, it is the duty of the Court of County Commissioners to fix such values for each of the years subsequent to the year for which the land was sold to the State for taxes.
3. The statutes do not provide an appeal from the action of the Court of County Commissioners.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of August 18, 1936 in which you make the following inquiries:

"1. Whether I have the authority to change the 1935 assessment on property sold to the State for 1934 taxes, upon application to redeem same. For example: If the owner of property sold to the State for 1934 taxes makes application to redeem same and the 1935 assessment on such property is not, in my opinion, sixty percent of the fair and reasonable marketable value of such lands, have I the authority to change the 1935 assessment on such property and certify such change to the Probate Judge of said County?

"2. If the party making application to redeem is not satisfied with the 1935 assessment so placed upon such property by the said Tax Assessor, can he appeal same to the Board of County Commissioners, or like governing body? Does the Board of County Commissioners, or like governing body have the authority to certify to the said Judge of Probate what they deem sixty percent of the fair and reasonable marketable value on such property?

"3. Is the assessment so placed upon such property by the said Board of County Commissioners, or like governing body, final, or does the taxpayer have the right to appeal such assessment, fixed by the

Board of County Commissioners to the Circuit Court of said County, should he be dissatisfied with the assessment thereon placed by such Board of County Commissioners, or like governing body?"

The reply to questions one and two is to be found in subsection (b) of Act No. 55, approved March 26, 1936 (General Acts 1936, page 30):

"(b) Upon application to the Probate Judge to redeem land, where the same has been sold to the State for taxes, which application shall be made on blank forms furnished by the State Land Commissioner, the probate judge shall submit such application to the Tax Assessor of the County in which the land sought to be redeemed is located, and the assessor shall, without delay, enter on such application an assessment value for each of the years for which taxes are due, **subsequent to the year for which such land was sold to the state for taxes**, and such assessment value shall be sixty percent of the fair and reasonable market value of such lands as of October 1st of the year or years subsequent to the year for which the land was sold for taxes. (c) Any party having a right to redeem said property, his agents or attorney, shall have the right to file a written protest with the Court of County Commissioners or like governing body of the County, and to the State Tax Agent objecting to the valuation of said land as placed on said property by the Tax Assessor as provided for under sub-section (b) of this section, setting forth his ground of objection to the assessed value of said property as fixed by said Tax Assessor, and the Court of County Commissioners or like governing body shall, thereafter, fix a day for hearing said protest by giving to the Tax Assessor and party desiring to redeem, his agents or attorney, at least ten days written notice of the day and place of hearing said petition, and upon the hearing of said cause, the Court of County Commissioners or like governing body shall have the right to review the assessed value of said property as fixed by the Tax Assessor, and shall fix and determine the assessed value for each of the years for which **taxes are due subsequent to the year for which such land was sold to the State** for taxes, as provided for under sub-section (b) of this act, and the Court of County Commissioners or like governing body shall certify to the probate judge the assessed value of said land so fixed." (Underscoring ours).

You will note that this provision very carefully declares that the Tax Assessor and, upon appeal, the Court of County Commissioners shall fix the value for each of the years **subsequent to the year for which the land was sold to the State for taxes**. It, therefore, appears by the express terms of the statute to be the duty of the Tax Assessor to fix a value on redemption for each and all years subsequent to the year for which the lands were sold and likewise upon objection and appeal for the Court of County Commissioners to do likewise.

I call your attention to the quoted paragraph from an opinion to the Hon. Eugene H. Hawkins, Judge of Probate of Jefferson County, Alabama, Quarterly Report Vol. I, page 207, at page 210 in which the construction of the word "taxes" as used in redemption statutes, is thus defined:

"Except for Section 100, there would be no question but that the Legislature can do likewise, and while there is not unanimity of opinion on this, I am persuaded that reason and logic support the view that the sale of the lands to satisfy tax obligation and the purchase by the State therefor, **satisfies** the debt or tax liability due to the State. After the sale to the State there can be no new assessment or tax liability. While

the amounts required to be paid upon redemption for the years subsequent to the sale are loosely termed annual taxes, such terminology is merely one of convenience, to describe the annual **amounts** which the Legislature has declared shall be paid. The fact that the Legislature has endeavored to have such amounts approximate what the annual taxes would have been if the property had been individually owned, does not convert such "amounts" into "taxes" or the annual valuations provided by the statutes into "assessments".

In answer to your third inquiry, the statute does not provide a further appeal from the action of the Court of County Commissioners and hence no appeal is allowable. The matter is purely statutory and if the Legislature did not authorize an appeal, none can be taken. The power of the Legislature in proceedings such as this is almost plenary and there is no right of appeal in tax matters except as the Legislature provides. *State v. Bley*, 162 Ala. 239.

But, as pointed out above, the annual amounts paid are not strictly speaking "taxes" but are annual amounts which the Legislature has provided shall be paid upon redemption, which fact, emphasizes the conclusion that the matter is purely legislative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 28, 1936.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Person having non-owners license required to purchase additional license to regularly drive truck or where he becomes owner of automobile under General Acts 1935, page 756 (Drivers License Act).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 7, 1936, in which you request my opinion as follows:

"If a person buys a non-owner license to drive a car and at a later date becomes the owner of a car, would he be required to buy a owner's license?

"If a person buys a non-owner license to drive a car and at a later date takes a job as truck driver, would he be required to buy a truck driver's license?

"Some of the holders of non-owner license do not think the law requires them to buy two licenses for the same thing in the same year, and I will thank you for your opinion on this matter."

In my opinion each of your inquiries should be answered in the affirmative.

By the so-called Driver's License Act (General Acts 1935, p. 756) every person (with certain specified exceptions not here involved) is required to procure a driver's license (Sec. 1). Section 2 of the Act contains certain

provisions requiring the payment of specific fees based upon the operation of various classifications of vehicles and with regard to the ownership of same. The following notation appears on the form prepared by the Highway Department for the Driver's License:

"The above named is hereby licensed to operate a motor vehicle in accordance with Act No. 331 of 1935.

Owner () Bus () Truck () Non-Owner (x)"

Section 3 requires the licensee to have his license card in his immediate possession.

By Section 10(a) of the Act it is made a misdemeanor for any person of whom a driver's license is required to operate a motor vehicle on a public highway without having first obtained such a license. As set forth above, a license is required of an owner of a motor vehicle and of a person who drives a motor truck. While it is true that one who purchases a 50c license may drive any vehicle, whether motor truck or private car and whether such party is the owner or not, nevertheless the text of the Act as heretofore considered precludes an adoption of the converse principle. (Cf. Commonwealth v. Magarosian, 158 N. E. 771 (Mass.)). It is therefore my opinion that before a party may operate a motor vehicle as owner, he must obtain a 50c license. He cannot avail himself of the fact that he has already purchased a 25c license as a non-owner. Nor would a person who has procured a 25c license be entitled to regularly drive a motor truck without taking out the 50c license required by Section 2, supra.

Part 17 of the opinion directed to Hon. Gaston Scott, Chairman, State Highway Commission, under date of October 5, 1935, (Quarterly Report of Attorney General, Vol. 1, pp. 17, 22) is in conflict with this opinion and it is hereby overruled.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 28, 1936.

Commissioners of Elmore County,
Wetumpka, Alabama.

Statutes—Act 564, approved September 6, 1927, Local Acts 1927, at page 377, which fixes compensation of members of the Court of County Commissioners of Elmore County held still in full force and effect.

Opinion by Assistant Attorney General Garrett.

Gentlemen:

I have your letter of August 18, 1936, which follows:

"The Legislature of the Session of 1927 passed an Act entitled: 'An Act to fix the compensation of the members of the Court of County Commissioners, Board of Revenue or such other governing body of Elmore County, Alabama,' which said Act was approved September 6, 1927, and appears in Local Acts, 1927, at page 377.

"Question: The above Act has not been amended or repealed. Therefore, is it still in full force and effect?"

In my opinion your inquiry should be answered in the affirmative.

The Act to which you refer is Act No. 564, approved September 6, 1927, Local Acts 1927, at page 377, which fixes the compensation of the members of the Commissioner's Court of your County.

You state in your letter that this Act has not been specifically amended or repealed. This being the case, it is still in full force and effect unless it has been repealed by implication by a general law dealing with this subject in the whole state.

Section 6771 of the Code of Alabama 1923 was the provision of the general law setting the compensation of members of County Commissioners, Boards of Revenue or like governing bodies in the State as a whole at the time your Local Act, *supra*, was enacted. The general law now in effect on this subject is Section 6771 of the Code of Alabama 1923 as amended by Act No. 669, approved July 31, 1931, General Acts 1931 at page 805. This 1931 amendatory act is the only general law passed by the legislature on this subject since your Local Act, *supra*, was passed, and it contains an express provision to the effect that it shall not apply to counties in which the compensation of the members of the governing body of the county is fixed by local law.

Therefore, it is my opinion that Act No. 564, *supra*, is still in full force and effect.

This opinion is limited to the questions asked.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 31, 1936.

Hon. S. G. Stephenson, Clerk,
Municipal Court of Bessemer,
Bessemer, Alabama.

Fees: No fee required for issuance of "garnishee release" in Municipal Court of Bessemer.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of August 19, 1936, which is as follows:

"Under section 7289 of the Code of 1923 providing the costs to be collected by this Court it is provided for every necessary certificate not otherwise provided for there should be charged a fee of twenty-five cents.

"The examiners are now making an audit of my accounts and they contend that this fee should be collected by me in advance and not charged as an item of costs. My contention is that if under this section of the Code I can force litigants to pay this one item of costs in advance that I can force them to pay any other item of costs listed under this section in advance which is in direct conflict with the Constitution of this State.

"I will give you this case as an example. A issues a garnishment against B for \$100.00 and a few days later comes in and orders me to release this garnishment for all except \$25.00 and costs. I contend that I am required to release this garnishment without the payment of the twenty-five cents in advance and charge this amount as other costs are charged. If I would refuse to release B's money as ordered by A, I think I would be liable to B for the wrongful holding of his money. I am enclosing a copy of the release which I refer to. I cannot find any provision of law permitting me to collect this amount in advance.

"I would appreciate an opinion from you in regard to this matter."

I am of the opinion that in view of the Local Act of 1885 (approved February 8, 1885, Acts 1885, page 416) you are not required to charge any fee for the issuance of what you refer to as a "garnishee release". I cannot find any provision of the general law which requires the issuance of any such certificate. On the other hand this office, in opinions addressed to Hon. Paul Ragsdale, Ex-Clerk of your Court, (Reports of Attorney General, 1922-1924, pages 432-448) held that the Local Act, *supra*, was not repealed by subsequent general legislation and, in effect, held that the schedule of fees as prescribed in the said Local Act, *supra*, control.

I am, therefore, of the opinion that you are not required to exact such a fee prior to the issuance of such certificate but am of the opinion that such a fee cannot be legally exacted.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 31, 1936.

Hon. J. F. Smith,
Clerk of Circuit Court,
Escambia County,
Brewton, Alabama.

Where a prisoner has escaped and remains at large, the provision of Section 3750 Code of Alabama, 1923, applies, but when captured, tried and convicted, the costs should be paid as in other criminal cases.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 19, 1936 in which you request my opinion as follows:

"Please give me your opinion on the following: We were holding in the county jail a defendant charged with petit larceny who, before he was sentenced, escaped from the custody of the jailer. Upon the defendant's apprehension another charge was placed against him for escaping legal custody. Upon the hearing of this case the defendant plead guilty to escape and also the original charge that he was being held for.

"As clerk of the Court I rendered to the Convict Department two cost bills, one for the original offense in which I charged the defendant and the state convict department with all sheriff's fees. In the escape

case I made no charge to the convict department for the fees of the sheriff as provided for by section 3750 of the Code of 1923. The state refuses to allow sheriff's fees in the original case.

"Please give me your opinion as to whether or not the convict department should pay fees of the sheriff in the original case."

Under the facts you state above, my answer is in the affirmative. I am aware of the provision in Section 3750 Code of Alabama, 1923, which is as follows:

"No sheriff must be paid out of the state treasury any fee or allowance whatever, on account of any prisoner who has escaped from his custody; but the commissioners' court may, in their discretion, pay such fees and allowances as are payable by the county, notwithstanding the escape of the prisoner, if satisfied that such escape was not caused by the connivance or negligence of the officer having charge of him."

I am of the opinion the above quoted section refers to costs in a case where the defendant has escaped and has not been recaptured and not to a prisoner who has escaped and has been recaptured and brought to trial. As long as the escaped prisoner remains at large then the above quoted section applies, but on recapture, trial and conviction, the costs should be paid as in other cases.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 31, 1936.

Hon. Howell Turner,
Secretary of State,
Capitol.

Printing of forms and licenses under Uniform Firearms Act is duty of State Comptroller, not of Secretary of State.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of August 25, 1936, requesting my opinion as follows:

"I am attaching hereto copy of Act No. 82.

"I will appreciate your advising me if, under this Act, it is the duty of the Secretary of State to have forms of applications and licenses printed. If not, whose duty is it and if the duty of the Secretary of State, from what fund should the printing be paid?"

I am of the opinion that it is not the duty of the Secretary of State to have printed the licenses described in the Uniform Firearms Act (Act 82, S. 63-Simpson, 1936 Acts page 51). The Act does not designate any department to furnish these supplies. It provides only that certain officials may issue licenses to carry pistols (Section 7), and that "the duly constituted licensing authorities of any city, town or political subdivision" may grant licenses to dealers. (Section 11). The only reference to the Secretary of State in this connection is that the licenses shall be "in form to be prescribed by the Secretary of State".

I do not feel that this is any indication that the Legislature intended that the Secretary of State should furnish the supplies. The duty to prescribe forms is frequently imposed on one department and the duty of supplying the forms is imposed on another. An instance of this is found in the Firearms Act of New York. (Subdivision 10, Section 10, New York Act passed April 8, 1936). In the absence of any provision in the Alabama law imposing on the Secretary of State the duty of furnishing supplies, I am of the opinion that the Secretary of State is not required to furnish same.

While the Act makes no definite provision as to who shall furnish these supplies, it is apparent that they are to be furnished by the State, as all funds derived from the issuance of these licenses must be paid into the State Treasury. It was evidently the intention of the Legislature that the duty of supplying the necessary forms and licenses should devolve upon that official of the State who generally has charge of furnishing licenses. This is the State Comptroller. It is my opinion, therefore, that the State Comptroller should furnish the forms and licenses provided in the Uniform Firearms Act, and that they should be in a form prescribed by the Secretary of State.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 31, 1936.

Hon. Coma Garrett, Jr.,
Probate Judge, Clarke County,
Grove Hill, Alabama.

Veterans' Exemptions—

1. Under the Acts of 1935, page 1057 veteran held not entitled to exemption of business license where business is operated through the efforts of wife.
2. Disability income from the Federal Government held not exempt from computation in arriving at a total income of veteran for exemption purposes.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of July 27th, 1936 in which you request my opinion as follows:

"We have a World War veteran in Clarke County who is fifty per cent disabled and is drawing \$50.00 per month from the Veterans Administration because of said disability. He is operating a beauty parlor under his own name, using his wife as his helper in operating the business. The veteran owns the business but his wife operates same for him. The veteran's net income from said beauty parlor is \$360.00 a year.

"The veteran himself is employed by a corporation for a salary of approximately \$500.00 per year, making a total income from his business as beauty parlor operator and with his salary from said corporation \$860.00 per year. His disability income from the United States Government is \$600.00 making a net income, including the disability income

which he contends should not be included in computing his net income and for purposes of net income is believed by him to be exempt, of \$1460.00 a year. His net income without the disability income is \$860.00 a year.

"Said beauty parlor is operated in the veteran's home.

"Is this veteran under the law of Alabama subject to pay a state and county license to enable him to operate his said beauty parlor?"

In reply, I wish to advise that in my opinion your inquiry must be answered in the affirmative. You state in your letter that the "Veteran owns the business but wife operates same for him". You further state that the veteran himself is employed by a corporation and his disability income added to his other income from all sources amounts to \$1460.00 per year.

Under the facts as stated, it appears that the beauty parlor is not operated through the personal effort of the veteran or the personal effort of the veteran and a helper, as the veteran renders no personal service in connection with the said beauty parlor. The statute is very clear on this point. Section 2 on page 1058 of the Acts of 1935 provides as follows:

"That each such veteran who shall engage in, or carry on, any business or occupation as a means of livelihood through the personal efforts of such person or through the personal efforts of such person and not more than one employee, helper or apprentice, for which business of occupation a license tax is prescribed by the State of Alabama, shall be entitled to a license from the State to so engage in, or carry on, such business or occupation upon payment of the license tax so prescribed, less all, or such portion of, such license tax as shall not exceed Twenty five Dollars (\$25.00); provided, however, that no such person shall be entitled to the prescribed deduction or commutation in respect of more than one business or occupation for which a license tax is prescribed by law."

It further appears that the veteran's total net annual income exceeds \$1200.00. The veteran may claim no exemption in this case. Page 1060, Section 14 of the Acts provides as follows:

"Any veteran whose property both real and personal is valued at Five Thousand (\$5,000.00) Dollars or more shall be precluded from the exemptions granted herein; **nor shall a veteran whose annual income is Twelve Hundred Dollars (\$1200.00) or more be entitled to the exemptions herein granted.**" (Emphasis ours).

You will note that the statute does not provide for an exemption of the amount paid him as a disability income by the Federal Government, in computing his total net annual income for exemption purposes. On the contrary the statute specifically says the **total net annual income** must not exceed Twelve Hundred Dollars (\$1200.00), without naming the sources from which it may come.

Premises considered, it is my opinion that the veteran here considered under this statement of facts is not entitled to exemption of license upon the operation of said beauty parlor.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 31, 1936.

Hon. L. O. Sanford, Treasurer,
Tallapoosa County,
Dadeville, Alabama.

Statutes—Local Acts 1935, page 89, Fine and forfeiture fund, Tallapoosa County.

The date at which a case is disposed of and not the date at which the certificate was issued in a criminal case where the State has failed or the case has been nol. prossed or abated by death or withdrawn and filed determines whether or not witness certificates fall under Section 3 of the Act referred to below. Also the date at which the case was disposed of would govern whether or not officer's scrip for services rendered in a case would be governed by Section 3 of the Act of the Legislature of 1935 below quoted.

Opinion of Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 26, 1936, in which you request my opinion as follows:

"Relative to Act No. 171 (H. 564-Bulger) approved on July 8, 1935, I will thank you to advise me if scrip covering cases tried or disposed of prior to the date of the approval of this act but not written up until after the date of the approval of this Act, is issued prior to the passage of this act or subsequent to the passage of the same.

"In short, I am referring to Section 3 of said Local Act for Tallapoosa County and desire to know whether State Witness Certificates and officers scrip are considered issued on the disposal of the case or when written up at a later date."

It is my opinion the date at which the case was disposed of governs rather than the date of actual issuance of such claim. The character of such claims is determined by the way the case is disposed of. The issuance of the certificates of attendance of witnesses or the certificates of officers for services are only evidence of such attendance and services but the actual character of such claim is determined by the way the case is disposed of. The section governing this matter is Section 3 of an Act approved July 8, 1935, Local Acts 1935, page 89 and is as follows:

"Section 3. The Treasurer, or other custodian of county funds is hereby authorized and required to apply the funds provided for in section one of this act exclusively as follows: \$2,500.00 each year for the payment of registered state witness certificates and officers scrip now payable out of Fine and Forfeiture fund, which may be issued after the passage of this act, and \$1,000.00 each year for the payment of registered state witness certificates and officers scrip now payable out of the Fine and Forfeiture fund, which have been issued prior to the passage of this act."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 2, 1936.

Hon. Howell Turner,
Secretary of State,
Capitol.

Foreign Corporations—Required to comply with the foreign corporation laws of Alabama before operations may be begun under authority granted to operate as a general contractor by the State Licensing Board under General Acts 1935, page 721.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 25, 1936, in which you request my opinion as follows:

"I call your attention to S. B. 112 of the 1935 Legislature, approved September 2, 1935, copy attached.

"You will note the definition of general contractors, in Section 1, and Section 9½ pertaining to foreign corporations. Please advise me as follows. In cases where a certificate of authority (Section 9) is granted a foreign corporation as a general contractor by the State Licensing Board and the fee of \$50.00 is paid to practice general contracting under S. B. 112, is it not necessary that said corporation also comply with the foreign corporation laws of Alabama by filing a certified copy of the articles of incorporation, certificate designating statutory agent and known place of business, paying franchise tax, procuring permit for the transaction of business and paying entrance fee, in pursuance of the foreign corporation laws of Alabama? Section 9 provides for the payment of \$50.00 to the Board, and also provides for the renewal of certificate of authority each year upon the payment of \$25.00 to the Secretary of the Board. We have been furnished with a list of persons and corporations licensed by the State Licensing Board for General Contractors and find a number of foreign corporations which were licensed and which do not appear upon your records as foreign corporations qualified for the transaction of business in Alabama."

It is my opinion that your inquiry should be answered in the affirmative. Your attention is respectfully directed to Section 232 of the Alabama Constitution of 1901, which provides as follows:

"Sec. 232. No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

This Section requires two things of a foreign corporation as a prerequisite to its doing business in the State: (1) That it have a known place of business and authorized agent, and (2) that it file with the Secretary of State a cer-

tified copy of its articles of incorporation or association. It specifically provides that the articles of incorporation or association must be filed with the Secretary of State and a compliance with this mandate is a prerequisite to its authority or right to do business in the State. Being a part of the Constitution, its requirements are unalterable, and the filing of such articles with any other officer except the Secretary of State would not constitute a compliance with the requirements.—See Biennial Report Attorney General 1918-1920, p. 544.

I further call your attention to Article 26 of the Code of Alabama, 1923 (Section 7209 et seq.), which is predicated upon Section 232 of the Constitution. *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152-156, 62 So. 560.

It is my opinion, therefore, that before a foreign corporation may practice general contracting in the State of Alabama, it is necessary that it comply with the foreign corporation laws of Alabama as set forth in Sections of the Constitution and Code referred to, *supra*. The fact that certificate of authority is granted to such a foreign corporation to operate as a general contractor by the State Licensing Board will not in and of itself be sufficient. It is to be observed that all of the provisions of the Act creating the State Licensing Board (General Acts 1935, No. 297, S. 112) relate merely to the licensing and registration of contractors rather than the regulation of foreign corporations.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 3, 1936.

Hon. Fred H. Price,
Clerk of Circuit Court,
Autauga County,
Prattville, Alabama.

1. Where a committing magistrate fails to commit the testimony to writing, he waives his right to collect the fee for such examination.

2. If the costs of a preliminary investigation are collected out of the defendant by execution, the costs of the magistrate and constable may be collected up to the amount of \$10.00 likewise the witness fees up to \$10.00 but if this cost is paid by the State under Section 3667 Code of Alabama 1923 only \$5.00 can be collected as costs of the magistrate and constable both together.

3. The fees allowed Justices of the Peace are the fees to be collected by the magistrate for trial on preliminary investigation.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 6, 1936, in which you request my opinion as follows:

"A defendant is charged with murder in the second degree in the complaint issued by the Judge of said Civil and Criminal Court and a

warrant of arrest is also issued by said Judge and the said warrant being executed by the Sheriff. The Clerk of the Civil and Criminal Court issued eleven subpoenas for State witnesses to appear at the preliminary hearing. These eleven subpoenas are served by the Sheriff and witnesses appear at said hearing and testify at said hearing. The committing magistrate binds the defendant over to the Grand Jury without bond and issues mittimus. The testimony at said hearing was not reduced to writing and when the Grand Jury met that body had before it only the complaint and warrant however a true bill was found and the defendant was indicted, and subsequently tried in Circuit Court and sent to the penitentiary for a term of twenty-five years. In the preliminary the following was done, viz:

"By the Judge, Civil and Criminal Court:

"Issuing Complaint
Issuing Warrant of Arrest,
Issuing mittimus.

"By the Clerk, Civil and Criminal Court.

"Issuing eleven witness subpoenas.

"By the Sheriff, Autauga County.

"Executing warrant of arrest.
Committing to jail,
Serving eleven witnesses.

"In addition, eleven State witnesses appeared before the committing magistrate at the preliminary hearing.

"If you hold that the proper papers were not sent to the Grand Jury to certify these preliminary costs, then please discuss fully the extent of the testimony that should be taken. If this testimony had been taken properly then cite the schedule of fees under which the fees for issuing complaint and issuing warrant would be taxed, then cite the schedule of fees under which the issuing of witness subpoenas would be taxed, then cite the schedule of fees under which the mittimus would be taxed. If and when said fees are collected from the convict department would you say that such fees are like 'Court Fees' and therefore fees due Autauga County. The latter for the reason that services of said committing magistrate are rendered at a stipulated compensation and there being no authority for payment of fees to a Clerk for rendering services in said preliminary.

"The Sheriff rendered the following services, viz:

"Executing warrant of arrest.
Committing prisoner to jail.
Serving eleven witness subpoenas.

"Kindly cite the schedule of fees under which each of the above would be taxed.

"The eleven State witnesses that appeared and testified at the preliminary hearing are next to be considered. Please discuss fully the schedule of fees for such witnesses. If you hold that these witnesses cannot be paid by the convict department then advise the correct pro-

cedure as to their compensation. What is desired in your opinion is a full discussion of how preliminaries may be held in the Civil and Criminal Court and conducted so that all fees may follow through and be collected on disposition of the case."

Under the facts stated by you, the committing magistrate would not be entitled to any fees as the law says the committing magistrate is not entitled to any cost unless he commits the evidence to writing and having each individual witness sign his testimony. I call your attention to Section 3755, Code of Alabama, 1923, which is as follows:

"Costs and fees in preliminary trials.—Whenever a defendant is convicted and sentenced to the penitentiary, or to hard labor, the costs of the committing magistrate and constable on preliminary trial, both together, not to exceed ten dollars, and the fees of the State's witnesses before the committing magistrate, not to exceed ten dollars, shall be taxed in the bill of costs in the same manner, and paid out of the same fund, at the same time and in the same way as is provided by law for the payment of other items of costs incurred by the State; but the committing magistrate shall receive no pay unless he reduces to writing the evidence taken on the preliminary trial, as required by law."

This section means, if the cost is collected out of the defendant by execution the preliminary cost is \$10.00. But if it is not collected by execution out of the defendant and the same is paid by the State, then under Section 3667, Code of Alabama, 1923, the State will only pay \$5.00 for constables' and magistrates' fees both together.

This section reads in part as follows: "Costs of committing magistrate and constable or preliminary trial, both together, not to exceed \$5.00."

The issuance of summons for witness by the clerk is without authority of law and therefore cannot form a part of the cost. See opinion of this office written July 9, 1936, to Hon. H. M. Britton, Judge of Probate, Randolph County, Book 12-A Office Edition.

Now as to the schedule of fees to be taxed in preliminary proceedings. See Section 3750, *supra*, Section 3756 and also Section 3753, Code of Alabama, 1923. The fees of the Justices of the Peace are taxed by the magistrate in preliminary proceedings. It is my opinion that witnesses receive the same fee when attending a preliminary trial as they receive when attending Justice of the Peace Court.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 3, 1936.

Hon. Cyrus B. Brown,
President, Board of Revenue,
Montgomery County,
Montgomery, Alabama.

- (1) Montgomery County may appropriate funds towards building Armory.
- (2) May issue warrants payable at future date.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of August 21, 1936, which is as follows:

"Montgomery County in accordance with provisions of Section 15 of Act No. 276 approved August 23, 1935, General Acts 1935, page 672,677, has been contributing \$50.00 per month to each of the three National Guard units located in Montgomery County.

"The Armory Commission of Alabama is now constructing an Armory in the City of Montgomery for the use of the two National Guard units located here in the City of Montgomery. The funds necessary for the completion of this project must be secured at an early date. The National Guard units of this City have no cash on hand with which to fulfill their part to be paid on the cost of said Armory.

"I desire an opinion from your office as to whether or not Montgomery County can pay to the two National Guard units located in this City their appropriations in advance in such an amount as may be necessary to allow these units to fulfill their obligations at this time.

"In the event Montgomery County could not make this payment in cash is there any law which would prevent Montgomery County from issuing warrants payable to the National Guard units and which they might use as a means of obtaining the cash at this time?

"I call your to attention the fact that Montgomery County does not come within the terms of the so-called County Budget Law."

Section 15, Act No. 276, General Acts 1935, pp. 672, 677, to which you refer in your letter, is as follows:

"Section 15. CITY AND COUNTY AID FOR ARMORIES: That every city and county in the State of Alabama now having, or that may hereafter have, an active National Guard or Naval Militia organization or organizations within its boundaries is hereby authorized and empowered to render such financial assistance as it may deem wise and patriotic to such National Guard or Naval Militia organization, either by donating such land or buildings or donating the use of land or buildings, or by contributing money to their equipment and maintenance."

The above section seems to be ample authority for Montgomery County to appropriate funds towards the erection of a National Guard Armory if the governing body of the county deems it advisable to do so.

I know of no provision of law which would prevent the county from making this payment in a lump sum, or by the payment of certain specified amounts monthly, nor am I aware of any provision of law which would prevent Montgomery County from issuing to these National Guard units warrants payable at future dates to cover the appropriation which the governing body has made to said National Guard Units.

Montgomery County does not come within the purview of the 1935 County Budget Law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 3, 1936.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Judge of Probate—Not entitled to commissions on fees paid to officers under Section 288 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of May 16, 1936, in which you request my opinion as follows:

“Your opinion is respectfully requested on the following question:—

“Where the Judge of Probate receives Comptroller’s warrant for the County’s part and officers fees includes on lands that were sold to the State for taxes and then resold by the State after the expiration of redemption period, and the Judge of Probate under Section 288 of the 1935 Revenue Act, pays over the same to the officers authorized to receive it, what rate of commissions, if any, is the Judge of Probate entitled to deduct for his service in handling the fund and making the payment over as set forth in the section cited?

“I have a warrant in hand received from the Comptroller and as I would like to know before proceeding to disburse it, will appreciate your answer to my question as promptly as possible for you to give it.”

Fees and commissions may be demanded and received only in cases expressly authorized by law. I know of no legislative authority under which compensation may be made to the Probate Judge under circumstances detailed by you above, and I am, therefore, of the opinion that no commissions are payable. See Code Section 7255; *Mobile County v. Williams*, 180 Ala. 639.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 3, 1936.

Hon. Henry S. Long,
Chairman, State Tax Commission,
Capitol.

Attention: Mr. Ray Henson.

License—Motor Vehicles—“Sedan Delivery” liable for truck license.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 24, 1936, in which you request my opinion as follows:

“Please advise this Department the correct tag classification a sedan delivery would require. For your information, a sedan delivery resembles

a passenger automobile, but carries a removable rear seat and is equipped with a back door.

"Some of the Probate Judges issue private car tags for these cars and others issue truck tags."

In my opinion the "sedan delivery" described in your inquiry should carry a truck license tag.

A Motor Truck is defined by Schedule 158 (j) as

"(j) 'Motor Truck': Any motor-propelled vehicle designed for carrying freight or merchandise or drawing a semi-trailer truck on not more than two axles and not operated or driven on fixed rails or tracks; but it shall not include self-propelled vehicles equipped primarily for passenger transportation."

It is clear from your description of the "sedan delivery" (and the very name given the vehicle so designates it) that this model motor vehicle is nothing other than a delivery truck. The mere fact that it is so constructed as to permit its use as a "private car" cannot bring it within the exception set forth in Schedule 158 (j) that

"It shall not include self-propelled vehicles equipped primarily for passenger transportation."

It is none the less a truck and it is therefore my opinion that it should carry a truck license.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 3, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Local Act No. 192, Acts 1936, pages 39 and 40 of 1936—Invalid in part.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of August 24, 1936, which is as follows:

"Is House Bill No. 192 approved March 31, 1936, constitutional?"

The Act referred to in your letter is found on pages 39 and 40 of the Acts of 1936, Special Session.

Section 1 of said Act reads as follows:

"The Board of Revenue or like governing body of Tuscaloosa County, Alabama, is authorized and empowered to create and set up, out of the general funds of said county, a contingent fund of not to exceed One Thousand Two Hundred Dollars (\$1200.00) per annum, for the purpose of employing additional clerical help and assistance and for paying

taxes, fees or other items, charged to or claims made against the Circuit Clerk, Tax Assessor, Tax Collector and Probate Judge or any of them by State or County Auditors or Examiners of Public Accounts."

Section 2 reads as follows:

"Payments from said funds shall be made upon warrants drawn in the same manner as employees and accounts of Tuscaloosa County are paid, provided, however, that before any of said officers are allowed additional clerical help and assistance, and before any taxes, fees or other items or claims charged against said officers are paid, satisfactory proof justifying the allowance and payment thereof, must be made and presented to said Board of Revenue or like governing body, and it is entirely within their discretion as to the disbursing of said funds for said purposes, but said payments shall not, in any event, exceed the sum of One Thousand Two Hundred Dollars (\$1200.00) per annum."

Those parts of the act above set out are all that are necessary to be considered for the purpose of this inquiry.

The act shows that the contingent fund so authorized is to be expended for two purposes, to-wit: Employing additional clerical help and assistance and (2) paying taxes, fees or other items charged to or claims made against certain county officials by State or County Auditors.

The power of the Legislature to authorize a county governing body to employ clerical assistants and to provide for their payment cannot be doubted. Any expenditures made under the provisions of this act for such purposes would be legal unless the act is unconstitutional on other grounds.

Under our system of government a State Legislature has the power to enact such legislation as it deems wise except as is forbidden by the terms of the Constitution.

There are several provisions of the Constitution of Alabama of 1901 which control the Legislature's action in enacting legislation appropriating or authorizing the appropriation of public monies to private individuals.

Section 94 is as follows:

"The legislature shall not have power to authorize any county, city, or town, or other subdivision of this state to lend its credit, or to grant public money or things of value in aid of, or to any individual association, or corporation whatsoever or to become a stockholder in any such corporation, association or company, by issuing bonds or otherwise."

Section 100 is as follows:

"No obligation or liability of any person, association, or corporation held or owned by this State, or by any county or other municipality thereof, shall ever be remitted, released or postponed, or in any way diminished by the Legislature; nor shall such liability or obligation be extinguished except by payment thereof; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; provided that this section shall not prevent the legislature from providing by general law for the compromise of doubtful claims."

Section 104, subdivision 28 is as follows:

"The legislature shall not pass a special, private or local law in any of the following cases:

"(28) Remitting fines, penalties or forfeitures."

In view of the above provisions of the Constitution of this State I am constrained to arrive at the conclusion that the legislature was without authority to authorize the county governing body of Tuscaloosa County to expend public monies for the purpose of paying the obligations of private individuals, when there is no legal or moral obligation on the part of the County to do so.

I refer you to the case of **Rogers v. White**, 70 So. 994, wherein it was held:

"Local Acts 1915, pp. 372, 373, in so far as it authorizes and requires the Board of Revenue of Jefferson County to pay over \$150 each month out of the general funds of the county to the secretary of the Birmingham Bar Association, or some other person to be designated by the judges of the courts of record in the county for the maintenance of a public law library in the City of Birmingham, violates Const. 1901 Sec. 94, providing that the legislature shall not authorize any county to lend its credit or grant public money in aid of any individual or association as the county acquired no interest in the library or any voice in its control."

I also refer you to an opinion rendered by this office wherein an act which was enacted for a similar purpose though not in exact conformity to the act here under consideration was declared violative of Section 100, *supra*.

Biennial Report Attorney General, 1926-28, page 579.

While the Act here under consideration does not specifically remit any named fine, penalty or forfeiture to any certain individual yet it clearly appears that its purpose is violative of Section 104 (28) *supra*.

In arriving at the conclusion that any expenditure made out of the contingent fund created by the said act for the purpose of paying the individual obligations of a county official, would be illegal, I am not unmindful of the decision of the Supreme Court of this State in the case of **State v. Clements**, et al 220 Ala. 515, 126 So. 162, wherein the following appears:

"An appropriation made in discharge of a moral obligation resting upon the state must be regarded as being for a public purpose, and within the constitutional powers of the legislature, and the fact that a private person may receive the benefit of such an appropriation does not constitute the act of appropriation a private one."

In so far as I am able to determine there is no moral obligation on the part of Tuscaloosa County to pay the individual obligations of its private officials.

I am confronted with the situation wherein it appears that one of the purposes of the act is legal, the other illegal.

An enactment of the legislature may be in part unconstitutional and in part constitutional and where the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected, and this rule applies, even though the constitutional and unconstitutional parts are in the same section of the Act.

Powell v. The State, 69 Ala. 10.

This rule has been applied to statutes having for their purpose the expenditure of public funds.

In re opinion of the Justices, 120 A. 868, 45 R. I. 289,

Kasanaugh v. Bordon, 149 S. W. 587, 244 Mo. 695,

State v. Parker Distilling Co., 139 S. W. 453, 236 Mo. 219.

Veterans Welfare Bd. v. Jordan, 208 P. 284, 189 Cal. 124.

In view of the above it is my opinion that the entire act is not invalid. The contingent fund may be set up as is provided in the act and payments may be made therefrom to compensate such additional clerical assistance as the Board of Revenue determines upon.

That part of the Act which authorizes the use of county funds for the payment of obligations of individuals is in my judgment invalid.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 3, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

1. Where forfeiture of appearance bond is made final, bondsmen are liable for the full amount of the bond and for the costs of collecting on forfeiture, but they are not liable for any of the costs of the criminal proceeding.

2. Where a defendant has forfeited his bond and a conditional judgment has been rendered by the court against the defendant and his sureties and is later set aside, this leaves the matter in statu quo, and the original appearance bond is in full force and effect unless the sureties on said bond procure a certified copy of the bond and arrest the defendant and deliver him to the sheriff.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 4, 1936, in which you request my opinion as follows:

"A defendant is arrested for violation of a State law and is released on bond by the Sheriff in the amount of, say, \$500.00. When the case is called for trial the defendant fails to appear and a conditional forfeiture is entered against the defendant and his bond as per Sections 3387-3391. Please advise me as follows:

"(1) If upon the hearing of the forfeiture the Circuit Court makes the forfeiture final for the full amount of the bond, viz: \$500.00, should

execution be issued against defendant and bail for the \$500.00 and costs, taking into consideration the fact that the undertaking is an appearance bond and Section 7221, Code of 1923?

"(2) In the event the conditional forfeiture is set aside prior to the time the defendant is rearrested, would such action by the Court relieve the Sheriff from arresting such defendant and the defendant from making a new bond (in other words, would such bail be reinstated and binding for the defendant to appear at the next term of the Court)?"

The bond mentioned is to guarantee the appearance of defendant. If he fails to appear, and forfeiture is made final, the bondsmen are liable for the full amount of the bond, and for the costs of collecting the forfeiture, but they are not liable for any of the costs of the criminal trial or proceeding.

The collection of the bond is a civil matter. It commences to be such "from issue of the notice or scire facias against obligors", and the bondsmen are liable for the costs of collection in the same manner as in other civil suits.—*Parker Case*, 83 Ala. 269, 3 So. 552; *Hatch v. State*, 40 Ala. 718; *State v. Harrison*, 4 Ala. 671; *Dover v. State* for the use of Winston County, 45 Ala. 244.

Answering your second inquiry, I am of the opinion if the forfeiture was merely taken against the defendant and bail and subsequently the court sets aside the forfeiture and makes no further order, this places the matter in statu quo, and the bail as originally taken continues. In order for the sureties on the appearance bond to discharge themselves, they must surrender the defendant to the proper authority. This may be done in the manner authorized by Sections 3384 and 3385 of the Code of Alabama, 1923.

Therefore, my answer to your second inquiry is in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 9, 1936.

Hon. I. T. Quinn, Commissioner,
Department of Conservation,
Capitol.

Public Printing—Game and Fish News may be printed under the provisions of Section 2904 of the Code of 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 9, 1936, which is as follows:

"The contract for printing the Alabama Game and Fish News, a monthly publication of the State Conservation Department, in the past has been awarded by the State Board of Administration under Class Three of Section 2896 of the Code of 1923.

"There are circumstances involved in the printing of this publication which lead me to believe that the contract should be awarded under Section 2904 of the same Code rather than under Section 2896.

"Twice in the past the contract for the Game and Fish News has been awarded to a printer outside the City of Montgomery. This, of course, is made possible under Section 2896. However, this has proved to be a big handicap in the transmission of copy and cuts. A publication of this size, printed monthly, necessarily demands close attention and almost constant contact with the printer while it is in the process of being printed. For this reason I think the magazine should at all times be printed within the City of Montgomery.

"I also wish to call your attention to the fact that the State Conservation Department is not specifically designated in Class Three of Section 2896 as are other Departments of the State.

"Section 2904 vests in the Governor, Secretary of State and the Attorney General the authority to make special contracts for any public printing when in their judgment such a contract will best serve the interests of the State or the Department of the State for the use of which the contract is so made.

"Please advise me at your earliest convenience if the contract for printing the Alabama Game and Fish News can be awarded under Section 2904 of the Code of 1923 instead of under Section 2896."

In answer to your inquiry, I am of the opinion that the Alabama Game and Fish News may be printed under the provisions of Section 2904, Code of 1923.

The Alabama Game and Fish News is printed under the provisions of Sections 16, 17, 18 and 19 of Act No. 240, S. 226, approved August 12, 1935 (Acts 1935, p. 632). Section 18 provides that such printing be paid out of the Game and Fish Fund in the same manner and upon the same terms as other public printing.

Section 2896 of the Code of 1923, classifies public printing into four classes. Class Three does not specifically enumerate the printing of the Game and Fish Department. However, it includes all other pamphlets or documents of a public nature, the publication of which is ordered by the Governor in pursuance of law.

Section 2904 of the Code of 1923, provides as follows:

"Section 2904. Special contracts for public printing let and made, by governor, secretary of state and attorney general.—The governor, secretary of state and the attorney general of the state may let and make special contracts with any person, firm or corporation for any public printing, or binding which they may deem necessary and proper for the use of the state or any department thereof. Such special contracts may be let at public or private bidding, as in the judgment of the governor, secretary of state and attorney general will best serve the interests of the state or the department of the state for the use of which the special contract is so let or made."

It will be seen from the above that the Governor, Secretary of State and the Attorney General may let and make special contracts for any public printing or binding which they deem necessary and proper for the use of the State or any department thereof. Said section, in my judgment, gives the Governor, Secretary of State and the Attorney General the discretionary power to make special contracts for public printing or binding which they deem necessary and proper.

The premises considered, it is my opinion that the Governor, Secretary of State and Attorney General have the discretionary power to make a special contract under the provisions of Section 2904, Code of 1923, for the printing of the Alabama Game and Fish News if they deem it necessary and proper.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 14, 1936.

Hon. G. H. Boyd,
Register, 10th Judicial Circuit,
First Division,
Birmingham, Alabama.

Petition to remarry held not to carry Library Tax provided for by General Acts of 1927, page 261.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 31, 1936, in which you request my opinion as to whether or not the Library Tax provided by General Acts of 1927, page 261, is collectible on petitions for the right to remarry. In my opinion there is no authority for collecting a Library Tax on petitions to remarry.

The Act providing for the fund for the support of the library (General Acts, 1927, page 261) is as follows:

"To provide a fund for the support of a law Library for the Circuit Court in counties of two hundred thousand or more inhabitants, without appropriations from the State or county treasury.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA, as follows:

"Section (1). That in all civil (including equity) cases hereafter filed in or brought by appeal or certiorari to the Circuit Court, of Counties of two hundred thousand or more inhabitants there shall be taxed as costs, the sum of one dollar in each case to be collected as other costs are collected, and to be paid to the Clerk of such Circuit Court.

"That said sum of one dollar shall be called the 'Library Tax' and shall be expended by the Circuit Court of such county by orders of the Presiding Judge thereof, for maintaining a Law Library for such Circuit Court. Provided, that this act shall not apply to cases filed by municipi-

palities for the purpose of selling property for collection of taxes due such municipalities.

"Approved August 11, 1927."

It is my opinion that this Act is intended to cover all civil cases which go upon the docket of the Circuit Court. The Act, in my opinion, includes all **original** cases. It does not levy a tax on ancillary proceedings. A petition by the respondent in an original divorce suit to be permitted to remarry has been held by this office to be an ancillary proceeding (See opinion Attorney General, Book 5A, office edition, page 276, and opinion to Mrs. Sallie Johnson Roberts, Register, Circuit Court, Chilton County, under date of July 20, 1936). It, therefore, follows that since the petition to remarry is an ancillary suit auxiliary to the original divorce proceeding, and is not an original suit within itself, the Library Tax would not be chargeable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 17, 1936.

Mrs. M. H. Hurt,
Clerk, Board of Revenue,
Macon County,
Tuskegee, Alabama.

Macon County—Act No. 105, H. B. 240 approved June 6, 1935 (Local Acts 1935, p. 46), which is a Budget Act applicable to Macon County, is not repealed by Act No. 379, H. B. 191, approved September 9, 1935 (Acts 1935, p. 803) known as the "County Financial Control Act." Said County must proceed under the provisions of the Local Act in question.

Opinion by Assistant Attorney General Screws.

Dear Madam:

I have your letter of August 26, 1936, which is as follows:

"At the first meeting of the Board of Revenue in October, 1935, the Board of Revenue adopted a Budget. During the fiscal year situations arose over which the Board of Revenue had no control resulting in an appreciable obligation against the County over and above what said Board of Revenue had reason to anticipate.

"We have a local Budget Act—H-240—Bridges, Local Acts 1935, page 46, which we think is in conflict with the County Financial Control Act of 1935, page 803. Section 19, General Act, states, 'All laws and parts of laws, **except local Acts applying to single Counties**, conflicting with any of the provisions of this Act be and they are hereby repealed.'

"1. Is this Local Act repealed?

"2. If not, can we function under Section 17, General Acts, when the local act in Section 6, provides how to meet emergencies?"

I am of the opinion that your first inquiry should be answered in the negative. Act No. 105, H. B. 240, approved June 6, 1935 (Local Acts 1935, p. 46), is a Budget Act applicable to Macon County alone. Section 19 of Act No. 397, H. B. 191, approved September 9, 1935 (Acts 1935, p. 803), known as the "County Financial Control Act," provides:

"Section 19.—REPEALS CONFLICTING LAWS. All laws and parts of laws, except local acts applying to single counties, conflicting with any of the provisions of this Act be and they hereby are repealed."

The Local Act in question, being applicable to only Macon County, comes within the exception of the repealing clause above set out.

I am of the opinion that your second inquiry should also be answered in the negative. Section 6 of the Local Act in question provides for the meeting of emergencies by pro-rating the appropriations made by the county governing body. Section 17 of the County Financial Control Act relates to emergencies under said Act. Since the Local Act is not repealed by the County Financial Control Act, Section 6 of the Local Act will control over Section 17 of the County Financial Control Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 17, 1936.

Hon. Edgar Underwood,
Judge of Probate,
Franklin County,
Russellville, Alabama.

(1) License—Beauty Parlors—Where owner of shop operates Beauty Parlor without employing operator, a minimum license only required.

(2) Schedule 21 and Schedule 86 of Revenue Law of 1935 distinguished with regard to imposition of license on Beauty operators.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 9, 1936, in which you request my opinion as follows:

"1. Referring to schedule 21, Revenue Acts of 1935, with reference to Beauty Parlors: Is the owner of the shop liable for the \$10.00 State license and the \$4.00 operator's license for the state if she does not employ an operator, but operates the shop herself? Or will the payment of the \$10.00 state license, and of course \$5.00 for the county, give the operator a right to operate the shop without the payment of the \$4.00 State and \$2.00 County license for an operator, if she does all the work herself?

"2. Please advise the distinction to be made between Schedule 21 and Schedule 86. Schedule 86 reads as follows:

"For each person engaging in the business of MANICURING, HAIR DRESSING, OR ADMINISTERING FACIAL TREATMENTS, five dollars (\$5.00) provided this Schedule shall not apply to such persons employed in Beauty Shops and beauty colleges, paying the license as provided under Schedule 21."

"Please advise the distinction to be made, and when to charge the license under Schedule 21, and when to charge the license under Schedule 86 Revenue Acts of 1935."

In my opinion, the payment of a \$10.00 State license and a \$5.00 license to the County is sufficient to permit the party mentioned in your inquiry to operate a Beauty Parlor. This office has heretofore held that Schedule 21 of the 1935 Revenue Act imposes a license upon the operation of a Beauty Parlor rather than upon the employees of such establishment. That there is imposed a minimum license of \$10.00 upon such Beauty Parlor and "a graduated license tax based upon two factors, viz: (1) the population of a city and (2) the number of employed operators, in all cases to which the minimum license tax is not applicable". (Office Edition of Attorney General, Opinion Book 6-A, page 72, opinion to Hon. Watkins M. Vaughan, Probate Judge, Dallas County, under date of August 30, 1935).

Inasmuch as under the facts detailed in your letter the owner of the Beauty Parlor employs no operators but operates the establishment herself, it is my opinion that there would be due only the minimum license prescribed by Schedule 21, to-wit, \$10.00 for the State and \$5.00 for the County.

Answering your second inquiry, I advise you that Schedule 21 is intended to cover all Beauty Parlors operating as such and all persons operating in them, while Schedule 86 is directed at persons engaged "in the business of manicuring, hair dressing or administering facial treatments" and not employed in a Beauty Parlor or beauty college. Thus a manicurist plying her trade, as such, in a barber shop would be subject to the license imposed by Schedule 86, as also would be an itinerant beauty operator; while a manicurist operating an established Beauty Parlor would be liable for the license tax levied by Schedule 21.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 17, 1936.

Mr. Solomon Baxter, Supt.,
Houston County Schools,
Dothan, Alabama.

County Board of Education.—Where School Principals are employed under contract for definite term at stipulated rate per calendar month and have performed services satisfactory to County Board of Education thereunder, it may order vouchers issued for payment of salary at prescribed rate.

Such expenses being current expenses within the meaning of Section 9, Acts 1935, page 728, County Board of Education may issue warrants or

certificates of indebtedness, secured by pledge of current revenues of current fiscal year, as provided by said section.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I wish to acknowledge receipt of your letter of August 1st, enclosing copy of contract entered into between the Houston County Board of Education and six School Principals providing for their employment for an indefinite term at \$175.00 per calendar month, stating that while the Board of Education had ordered payments thereunder suspended after May 31, 1936, until further notice, it wished to pay these salaries for the months of June, July and August, and had issued vouchers for two of these months, and stating further—

“The Board of Education will have on hand on October 1, 1936, approximately \$5,000 cash balance. The Board of Education owes approximately this amount of debts incurred prior to October 1, 1935. The said debts, as I understand, under the new budget law must be paid or funded on or before October 1, 1936. The Board of Education is anxious to pay these debts and also anxious to pay its principals. The salaries for these six principals will amount to \$3,000 for the three months. This will make the Board of Education owe a deficit of approximately \$3,000. Also the Board of Education has pledged its county-wide three mill tax for P. W. A. building bonds. The entire amount of the three mill county wide tax is not required to retire these bonds. The returns from county-wide three mill tax is approximately \$36,000 annually and the payments for the bonds for which the tax has been pledged amounts to about \$12,000 annually. This leaves the sum of approximately \$24,000 that is not required to pay the bonded indebtedness each year. The Board of Education would like for you to answer three questions if possible with the information given in the case.

“First, Can the Houston County Board of Education by proper resolution order the payment of salaries of the principals of the six consolidated schools of Houston County, Alabama, for the months of June, July and August?

“Second, Can the Board of Education of Houston County, Alabama, borrow money over and above the bonded indebtedness and pledge, so to speak, a second mortgage on the county wide three mill tax to pay the old indebtedness or pay for the services of the principals of its consolidated schools?

“Third, can the Board of Education of Houston County, Alabama, borrow money over and above the bonded indebtedness to pay debts incurred prior to October 1, 1935, by using the county wide three mill tax as collateral? If the Board of Education cannot borrow money and pledge its county wide three mill tax over and above the bonded indebtedness for the payment of these debts and for principal's salaries what fund, if any, can be used to pay same?”

From the copy of the contract attached to your letter it appears that the several principals were thereby employed for an indefinite term at the rate of \$175.00 per calendar month. While the County Board of Education temporarily suspended actual payment under the several contracts by its resolu-

tion of May 29, 1936, I assume that the principals in question continued to perform such duties as may have been required of them meanwhile. Since the County Board of Education has authorized the actual payment of the respective salaries for two of the intervening months by vouchers properly executed and presented, these should be paid if there are funds available.

Section 9 of the Acts of 1935, page 728, provides the occasion and manner in which the County Board of Education may borrow money, and is as follows:

"Section 9. FUNDS MAY BE BORROWED AGAINST REVENUES OF CURRENT YEAR.—Any county board of education or any city board of education shall have authority upon the recommendation of the county superintendent of education or city superintendent of education, as the case may be, to borrow money on the credit of the school fund of that county or city to meet the salaries of teachers and other current expenses when the current funds on hand are not sufficient to meet the same, and as security therefor, to pledge the current revenues of the current fiscal year. It shall be the duty of the county board of education and the county superintendent of education or city board of education and city superintendent of education to secure such a loan if practicable, when the current funds on hand are not sufficient promptly to pay teachers' salaries and other current expenses. All such current loans shall be due and payable not later than the end of that fiscal year. Provided, however, that the county board of education or the city board of education may issue certificates of indebtedness for payment of current expenses which are due when funds on hand are not sufficient to pay such obligations and when an adequate loan cannot be secured. Such certificates of indebtedness shall become due and payable not later than the close of the fiscal year in which they are issued and shall pledge the current revenues of that fiscal year. At no time shall loans be secured or certificates of indebtedness be issued for current expenses during any year which shall pledge school revenues of any other fiscal year. The amount which is borrowed, either by loan or certificate of indebtedness, shall at no time exceed one-third of the sum paid for all current expenses, including teachers' salaries during the preceding school year. Boards of education shall have authority to pay interest at the rate of not exceeding six per cent (6%) per annum on such loans or such certificate of indebtedness as may be issued."

In my opinion your questions, so far as, the facts stated permit, should be answered as follows:

First. If the principals in question have performed such services as may have been required of them under their contracts to the satisfaction of the County Board of Education, it would be proper for it to authorize and direct the payment of their salaries for the months involved.

Second. Such expenses being current expenses within the meaning of Section 9 of the Act above quoted, the County Board of Education could borrow money or issue certificates of indebtedness and for the payment of such warrants or certificates it can pledge the current revenues of the current fiscal year. This must be done strictly in conformity with the provisions and requirements of the Act.

Since it does not appear precisely when, nor for what specific purpose the amount of debts "incurred prior to October 1, 1935", were created, I can-

not answer your third question formally, nor such of the other questions as relate to these debts. However, for your information I may informally point out the provisions of Act No. 94 of the Special Session of 1936, being Acts 1936, Extra Session, pages 58, et seq., wherein provision is made for the refunding prior to October 1, 1936, of certain indebtedness outstanding on September 30, 1935. The provisions of this Act are in great detail and I am sure you will have no difficulty in following strictly the procedure there outlined, insofar as it may apply to the particular facts with which you are confronted.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 19, 1936.

Hon. H. F. Crandall,
Board of Registrars,
Dallas County,
Selma, Alabama.

Elections—

(1) Periods of registration in various counties governed by law providing for the same.

(2) No "all time" registration provided for in Dallas County.

Opinion by Assistant Attorney General Small.

Dear Sir:

Under date of August 26, 1936, you requested my opinion as follows:

"I am serving as a member of the Board of Registrars of Dallas County and as I am not in agreement with the two other members of the board will thank you for your opinion.

"While there is a provision for the registration books of the county to be open at certain periods I have been unable to find anything which would keep the books from being open for registration at all times.

"It is my contention that the books are not open all of the time because of the expense to the state and that if some of the other counties of the state have all time registration that it would not be illegal for these books to allow registration at all times provided there is no additional expense to the state.

"There are quite a few minors who will become of age between this and the time of the election. Any person twenty one years of age is entitled to vote and this they cannot do unless they have registered. Persons living in other counties in the state may register and it is my contention that citizens of Dallas County should receive the same treatment."

In reply, I wish to advise you that, in my opinion, the registration periods in all counties in Alabama are governed by the exact provisions of the law providing for the same.

I can find no provision of the law permitting all time registration in Dallas County and, in my judgment, legal registration of voters may be done at periods provided by law.

I wish to refer you to an opinion of the Attorney General under date of June 18, 1936, addressed to Hon. R. H. McAnelly, Judge of Probate, Jackson County, copy of which is enclosed for your convenience.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 19, 1936.

Hon. Hunter Phillips,
Tax Assessor,
Choctaw County,
Butler, Alabama.

Taxation—Escapes—Owner Unknown—

1. In making "owner unknown" assessment both for current and "escape" assessments Assessor must give notice as required by Section 53 of the 1935 Revenue Act to person to whom such property was last assessed, and must make diligent inquiry to ascertain owner.

2. Under Section 45, it is the duty of the Assessor to make "escape" assessments of any property not included in any assessment within five years next preceding the current year.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of August 26, 1936, requesting information as follows:

"We have several tracts of land in this county that have escaped taxation for five or more years and in a number of cases I am unable to locate the owners with a registered notice. In these cases where the last person that assessed the property can't be found is it necessary to send a registered notice? Also, advise if it is legal to make assessments on this escape property after the Books of Assessments and the Abstract of Assessments have been completed."

In answer to your first question it is my judgment that in making the owner unknown assessments both for the current year and the "escape" assessment for the previous years you should follow strictly the provisions of Section 53 of the 1935 Revenue Act. Your record should affirmatively show the making of or the attempt to make the service of the demand therein required. Of course, you should make diligent inquiry to ascertain the name of the owner of the property.

As to making the "escape" assessment, Section 45 of the Act not only authorizes the making of the assessment but requires it "whenever the Tax Assessor shall discover that any property has escaped taxation in any assessment within five years next preceeding the current year".

As to making this after the completion of your book of assessments and abstract you can add this by way of supplemental abstract.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 19, 1936.

Hon. Howell Turner,
Secretary of State,
Capitol.

Elections—Provisions of Section 464 of the 1923 Code of Alabama, relative to party emblems are directory and not mandatory.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of September 4, 1936, in which you state:

"Several weeks ago a candidate for Congress qualified with this office for his name to be placed on the ballots as a Farmer Labor candidate. Not having received a certificate of his nomination by the chairman and secretary of the Farmer Labor Party we advised him to let us have same. We received on August 3rd request for information by the district chairman of this party as to the requirements for filing nominations. We complied with this request citing him to Sections 642 and 464, specifically calling his attention to the filing of party emblems at least sixty days before the general election. Not receiving a reply we wrote him again on August 29th calling his attention to the fact that these emblems should be in this office by Friday, September 4th. We have today received from the candidate, with copy to the chairman of the party, the following letter:

"A copy of your letter of a few days ago addressed to Mr. Mort L. Bixler, Mobile, Alabama, has been received here.

"It will be impossible, at this late date for us to secure the necessary Farmer-Labor Party Emblems and the cuts which you require in order for such emblems to be printed on the ballots.

"If some other district in the State has supplied you with such emblems, it seems that they could be used in this district also.

"However, as it is apparent that none are available, I feel that it will be necessary for the column to be printed up without the emblems, and merely with the name of the party and the candidates qualified to run thereunder."

"We have received no emblems. Will you advise if there is any provision of law whereby the names of candidates of a political party can be placed on the ballots without being headed by a party emblem and should I comply with Section 462 in certifying the names to the Judge of Probate when they will not be headed by a party emblem?"

In my opinion you should place the name of the Farmer Labor candidate on the ballot, and comply with Section 462 of the 1923 Code of Alabama, as to certifying his name to the Probate Judges, although there will not be a party emblem on the candidate's ticket.

The object of placing the party emblem on the ballot was to help the illiterate voter select his candidate. In the early days it was more important to have the party emblem on the ballot than at the present time. I cannot conceive of how any voter today might be misled by the absence of the emblem designating the Farmer Labor Party.

In the case of the People of the State of Illinois ex rel. Birel Milburn et al., v. E. Perry Hutson et al., 267 Illinois Appellate, p. 395, the Court said:

"A mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. In doing so they must necessarily consider the importance of the punctilious observance of the provision in question to the object the legislature had in view. If it be essential it is mandatory. No universal rule can be given to distinguish between directory and mandatory provisions. The controlling question in this as in all other rules of construction is what was the intention of the legislature? Whether a statute is mandatory or directory does not depend upon its form but upon the legislative intention to be ascertained from a consideration of the entire act, its nature, its object and the consequences which would result from construing it one way or the other.' If it is apparent that it was the intention of the legislature that the things prescribed to be done in the preparation of the ballot shall be mandatory then a violation of the act in this regard renders an election void regardless of all other considerations. * * *"

In the case of Jones v. State ex rel. Wilson, 55 Northeastern, p. 229, the Supreme Court of Indiana said:

"The absence of the party emblem from the relator's party ticket presents the only grave question raised by the record. We recognize the force of the argument that the object of the party emblem is to guide the illiterate voter in his selection of candidates, but it is not necessary for us to decide, and we do not decide, that its absence may be excused, or that the provision of the statute in relation thereto is directory and not mandatory in all cases. In the case at bar but two political parties participated in the election, and there were but two lists of candidates upon the official ballot. At the head of one ticket or list of candidates was the usual and well-known party emblem, which could hardly fail of qualifying the illiterate voter to adopt that party's candidates, if he preferred them, or to successfully avoid them by choosing the only others.

In this instance, therefore, we do not perceive how the voters could have been misled by the absence of the emblem, nor how the appellant could have been injured by the failure of his opponent to have his party candidacy properly advertised upon the official ballot."

The premises considered, it is my opinion that the provisions of Section 464 of the 1923 Code of Alabama, relative to party emblems are directory and not mandatory and, therefore, the Farm Labor candidate's name should be placed on the ballot without being headed by an emblem, and you should certify the same to the Probate Judges.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 19, 1936.

Hon. W. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Redemption of real property—

Land Commissioner held to be entitled to 10 per cent of the amount of tax charged against land sold for taxes and bid in by the state but not entitled to any part of officer's fees charged against said land.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion under date of August 29th, 1936, as follows:

"Under the Acts of 1935, page 916, you will note, "The State Land Commissioner, with the approval of the Governor, may contract with a person or firm in each county to investigate the sale of real estate for taxes, bid in for the State' etc, and a contract may be made with each person with the approval of the Governor for a sum not exceeding 10 per cent.

"The State Land Commissioner made such a contract with Mr. C. L. Patterson, which contract has been approved by the Governor. We wish to know whether or not the Land Agent is entitled to receive 10 per cent, not only on the amount of the tax, but also 10 per cent of the officer's fees that will be charged against said land."

In reply I wish to advise you that, in my opinion, the Land Commissioner is entitled to 10 per cent of the amount received by the State as tax or proceeds from the sale of the real property here concerned, only.

The officer's fees are added to the amount of the tax due and can, in my judgment, constitute no part of the sum from which the Land Commissioner is to receive his commission.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 26, 1936.

Hon. Charles E. Bragg,
Judge of Probate,
Lawrence County,
Moulton, Alabama.

Gasoline Tax Fund—

Lawrence County, under Act No. 336, approved September 6, 1935, Local Acts 1935, page 204, and Act No. 361, approved September 7, 1935, Local Acts 1935, page 215, may issue refunding warrant payable out of the 25 per cent of the proceeds of the gasoline tax fund to be set aside by Act No. 336, supra, beginning October 1, 1936, for the purpose of retiring outstanding road debts, in an amount equal to the indebtedness represented by the old warrant, which includes both principal and accrued interest, if the old warrant was properly drawn against the gasoline tax fund when originally issued; and said refunding warrant may bear interest at a rate not exceeding 6 per cent, also to be paid out of said 25 per cent of the proceeds of the gasoline tax fund to be so set aside.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 25, 1936, in which you make the following inquiry:

"May Lawrence County issue refunding warrant payable out of gasoline tax fund for an old warrant payable out of gasoline tax fund plus accrued interest thereon and, if so, may said refunding warrant bear interest also payable out of gasoline tax fund?"

For the purpose of this opinion, I assume that the old warrant which you desire to refund was properly issued against the gasoline tax fund and that it contained a proviso that it should bear interest at a certain rate payable out of the gasoline tax fund.

This office, in an opinion addressed to Hon. Charles S. McDowell, County Attorney, Barbour County, Eufaula, Alabama, under date of November 7, 1933, which is found in the Biennial Report, Attorney General, 1932-1934, at page 407, held that a county might pledge revenue anticipated from the gasoline tax. There is nothing before me to indicate that the old warrant which you wish to refund was not issued in accordance with the provisions of the law as stated in that opinion.

The acts which must be considered in arriving at an answer to your question are Act No. 336, approved September 6, 1935, Local Acts, 1935, page 204, and Act No. 361, approved September 7, 1935, Local Acts, 1935, page 215, which are both local acts affecting Lawrence County. These two acts were introduced and passed at the same session of the Legislature, Act No. 336, supra, being signed by the Governor on one day and Act No. 361, supra, being signed by him on the next day. They both deal with the finances of Lawrence County and are, in my opinion, companion measures. They must, therefore, be considered in *pari materia*.

These two local acts are somewhat vague and difficult of interpretation.

The title of Act No. 336, supra, provided as follows:

"To require that twenty-five per cent of the total funds, received by Lawrence County, Alabama, from the levy and collection by the State of gasoline taxes or taxes on other motor fuels, to be used for the purpose of paying the **principal** of all county road debts contracted prior to **October 1, 1935**, including bonds of said county issued for the purpose of building public roads in said county; to provide that the Board of Revenue shall ascertain during the month of **October, 1935**, and register in a book of permanent record and publish in the county paper, or cause such to be done, the various amounts of **all the road debts** of the county, specifying particularly the amounts owed, to whom such amounts are owed, when such amounts are due and the **interest rate, if any**, thereon; to provide for the permanent continuation of this record and to provide the method for the retirement of **such indebtedness**." (Emphasis ours).

It provides in Section 1 thereof that the Board of Revenue of Lawrence County is required, beginning **October 1, 1935**, to set aside and use exclusively 25 per cent of the gasoline tax fund received by the county from the state for the retirement of the **principal** of all county road indebtedness. It must be noted that this section makes no mention whatever of **interest** on this indebtedness but deals only with **principal**.

Section 2, however, provides that the Board of Revenue shall, during the month of **October, 1935**, make a record of the amounts of **all road indebtedness** monthly, quarterly or at such other times as it deems best to **and the interest rate, if any** thereon.

Section 3 provides that this record shall be kept up to date by "recording all monthly or other payments of **interest and/or principal** and show the respective balances owing after each payment transaction." (Emphasis ours).

Section 4 provides that after the **whole indebtedness** of the county has been ascertained the Board of Revenue shall arrange payment of **such indebtedness** monthly, quarterly or at such other times as it deems best to conform to that part of the income from the gasoline tax fund for such periods.

Section 7 provides that the Act shall become operative **October 1, 1936**.

This act requires that 25 per cent of the proceeds from the gasoline tax fund received by Lawrence County be set aside. That much is clear and admits of no interpretation. But when is the Board of Revenue to begin setting the 25 per cent aside and for what purpose is this 25 per cent to be used? The title provides that it shall be used for the purpose of paying the **principal** of all county road debts contracted prior to **October 1, 1935**, and further that the board of Revenue shall ascertain during the month of **October, 1935**, and register in a book of permanent record, etc. the various amounts of **all the road debts** of the county, etc.; Section 1 says that the Board of Revenue is to begin setting it aside on **October 1, 1935**, to be used for the retirement of the **principal** of all county road indebtedness; Section 2 requires that a record be made during the month of **October, 1935**, of all road debts which shall show the **interest rate, if any**, thereon; Section 3 requires that this record be kept up to date by recording all monthly payments of **interest and/or principal**; Section 4 provides that after the **whole indebtedness** has been ascertained, the Board of Revenue shall arrange for the payment of **such indebtedness**; and Section 7 provides that the act shall become operative **October 1, 1936**.

Let us first consider the question as to when the Board of Revenue should begin setting this 25 per cent aside. All references to dates, both in the title and in the body of the act, are as shown above, to **October 1, 1935**, and the month of **October, 1935**, except the reference in Section 7, which is to **October 1, 1936**.

The journals of the 1935 Legislature have been carefully examined to see if the date, **October 1, 1936**, the date the act is become operative, could be due to a clerical error or misfusion. If so, this error would be self-correcting, and **October 1, 1936**, could be read as though it were **October 1, 1935**, and the act could be made operative as of that date. But such is not the case. The journals reveal that the bill was introduced in the House with all references to dates, including the date it was to become operative, being to **October 1, 1935**, or the month of **October, 1935**. The bill passed the House in this condition and was sent to the Senate. Before it was passed in the Senate it was amended to make the date it was to become operative **October 1, 1936**, instead of **October 1, 1935**. It passed the Senate as thus amended and was returned to the House where the author of the bill moved concurrence in the Senate amendment. The House accepted the Senate amendment and the bill was enacted into law as amended. This clearly shows an intention on the part of the Legislature to have the Act become operative on **October 1, 1936**, and not on **October 1, 1935**, and I hold that it does become operative on **October 1, 1936**.

Since the act does not become operative until **October 1, 1936**, none of the things which the act provides shall be done on either **October 1, 1935**, or during the month of **October, 1935**, could have been done at that date. Therefore, unless we can read these references to 1935 dates as though they were to the same dates in 1936, the act can be given no practical operation. I have recounted how the bill was amended in the Legislature to make it operative on **October 1, 1936**, instead of **October 1, 1935**, as originally intended. To me, this shows that the Legislature intended that all references in the Act to dates should be advanced from 1935 to the same dates in 1936, just as it, by amendment, advanced the operative date from **October 1, 1935**, to the same date in 1936, and that it was only through inadvertence on its part that the Legislature failed to so change all of these references to dates. Therefore, it is my opinion that all references in Act No. 336, supra, to certain dates in 1935, both in the title and in the body of the act, must be read as though they were to the same dates to the year 1936. This is the only way that we can affect the legislative intent and give the act a practical operation. We find ample authority in the decisions of our Appellate Courts for this view. I quote and cite in extenso from these decisions.

The legislative intent is to be sought in construing a statute. *Sunflower Lumber Co. v. Turner Supply Co.*, 158 Ala. 191, 48 So. 510.

The fundamental rule of construction is to ascertain and give effect to the intention of the legislature as expressed in the statute. *Street v. Cloe*, 207 Ala. 631, 93 So. 591; *Cheek v. Odam*, 20 Ala. App. 31, 100 So. 782.

Statutes must be construed to effectuate the legislative intent. *Priest v. State*, 5 Ala. App. 171, 59 So. 518.

Statutes should be construed according to the manifest purpose and intent of the legislature and such purpose should not be defeated by narrow

construction based upon nice distinctions in the meaning of words. **Thomason v. Court of County Commissioners**, 184 Ala. 28, 65 So. 87.

In ascertaining a dubious intent great weight will be given to the practical effect which a proposed construction of the statute will have. **Worthen v. State**, 189 Ala. 395, 66 So. 686.

Statutes should receive a sensible construction such as will effect the legislative intention and, if possible, so as to avoid an unjust or an absurd construction. **Birmingham Railway Light & Power Co. v. Green**, 4 Ala. App. 417, 58 So. 801; **Ex parte Rowe** 4 Ala. App. 254, 59 So. 69.

The intention of the legislature in enacting a law is the law itself and must be enforced when ascertained, though it may not be consistent with the strict letter of the law. **J. H. Davis & Co. v. Thomas**, 154 Ala. 279, 45 So. 897.

Courts in construing a statute will give it that construction which will effectuate the purpose of the legislature in passing it. **Lynn v. Broyles Furniture Co.**, 3 Ala. App. 634, 67 So. 122.

Literal interpretation will not be attempted when it would defeat the purpose of the statute if any other reasonable construction can be given. **Harrington v. State**, 200 Ala. 480, 76 So. 422.

The court in construing a statute must seek the legislative intent from the statute as a whole. Where sections or divisions of an act are conflicting the last in order of arrangement controls. **Davis v. State**, 16 Ala. App. 397, 78 So. 313.

A statute must be construed as a whole and the intention of the whole set will control the interpretation of the parts. **Patterson v. State**, 16 Ala. App. 483, 79 So. 157.

I have held above that all references in the Act to certain dates in 1935, both in the title and in the body of the Act, must be construed as though they were to the same dates in the year 1936. This holding, so far as it relates to the dates in the title of the Act, is arrived at my references to the body of the act and by construing the title in connection with the body thereof. I do not find where the Appellate Courts of this State have passed on the question of whether or not, in construing the language used in the title of an Act, reference may be had to the body of the Act. But we do find authority for this view in *Corpus Juris*, which cites cases from other jurisdictions. I quote as follows: from *Corpus Juris*:

"It has been held that it is permissible in construing the title of a statute to refer to the body of the Act." 59 C. J. 810.

Since all references in the Act to certain dates in 1935, both in the title and in the body of the act, must be read as though they were to the same dates in 1936, it necessarily follows that the Board of Revenue must begin setting aside this 25 per cent of the proceeds of the gasoline tax fund received by it on **October 1, 1936**, instead of on **October 1, 1935**, as stated in the act.

Now let us consider the question, for what purpose is this 25 per cent to be used. I have already pointed out above that Section 1 refers to **principal** only, that both Sections 2 and 3 refer also to **interest** and that Section 4 refers to the **whole indebtedness**.

The courts have held that the amount of one's indebtedness today is the principal sum which may be legally collected from him at a future time plus any interest that may have accrued to date. See *Effing v. City of Columbus*, 43 S. E. 803, at page 806. Construing Act No. 336, supra, as a whole, it is my opinion that the 25 per cent of the gasoline tax fund there set aside was intended to be used, not just for the retirement of the **principal of the whole road indebtedness** of the county but for all of **such indebtedness**, including **interest**, as well as **principal**. The cases cited above in support of my holding in regard to the dates used in the Act are likewise authority for this view and are to be considered as here cited in support thereof.

Section 4 of Act No. 361, supra, reads as follows:

"Section 4. The Board of Revenue of Lawrence County, Alabama, shall, as soon as practicable after October 1, 1935, refund all outstanding warrants unpaid at the time this act goes into effect and for which no money is available at that time. The refunding warrants shall not be sold below par, nor at a greater interest rate than six (6) per cent, nor may they be issued for greater amounts than was represented by the old warrants. They shall be made to mature at such maturity dates as will correspond with the estimated amounts represented by the sinking fund from the gas or other motor fuel taxes provided for by law and/or such other funds as may now be or may hereafter be provided."

These provisions of Act No. 361, supra, in my opinion, give the Board of Revenue of Lawrence County the authority to issue refunding warrants to bear interest at a rate of not more than 6 per cent, for the amount of the **indebtedness** covered by old warrants, including both **principal** and **interest**.

Considering these two local acts in *pari materia*, it is my opinion that, under their provisions, the Board of Revenue of Lawrence County has the authority to issue a refunding warrant, bearing an interest rate of not more than 6%, with both **principal** and **interest** to be paid out of the 25% of the proceeds of the gasoline tax fund to be set aside beginning **October 1, 1936**, for the retirement of outstanding road indebtedness, in a **principal** amount equal to that represented by an old warrant, including both **principal** and **accrued interest**, which was properly issued against the gasoline tax fund in the first instance.

I also wish to call your attention to Act No. 51, approved March 26, 1936, General Acts, 1936, page 28, which invests the Board of Revenue or Court of County Commissioners or other governing body in each county in the State of Alabama, with the authority to expend an amount not to exceed one-third of the total amount that may be received by each county from the levy and collection of any tax on gasoline by the state in the payment of any debt that may have heretofore been incurred by such county for the construction and/or maintenance of roads and bridges. In my opinion, this act does not in any way conflict with or repeal any of the provisions of the Local Acts No. 336 and No. 361, supra. This latter act merely gives the Board of Revenue of Lawrence County the right, if it so desires, to use 33 1-3 % of the proceeds of the gasoline tax fund received by it for the purpose of paying debts previously incurred by it in the construction and/or maintenance of roads and bridges, between March 26, 1936, its operative date, and **October 1, 1936**, the operative date of Local Act No. 336, supra; and after that date it extends the authority given the Board by Act No. 336, supra,

giving it the right, if it so desires, to use an additional 8 1-3% of the proceeds of the gasoline tax fund for this purpose, as well as the 25% it is required to use for this purpose beginning October 1, 1936, by Act No. 336, supra.

Act No. 379 approved September 9, 1935, General Acts, 1935, at page 803, which is popularly known as the Lee County Budget and Financial Control Act, is not applicable to your county, in so far as it conflicts with the provisions of your Local Acts No. 336 and No. 361, supra. Section 19 of this Act provides that it does not repeal Local Acts applying to single counties.

The opinion heretofore rendered to you in answer to this inquiry on May 16, 1936, is hereby withdrawn and overruled and this opinion is hereby substituted in its stead.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 26, 1936

Hon. Charles E. Bragg,
Judge of Probate,
Lawrence County,
Moulton, Alabama.

Gasoline Tax Fund—

Board of Revenue of Lawrence County held authorized to enter into agreement with State Highway Department for the construction of a road in Lawrence County, the cost of which is to be borne jointly by the State Highway Department and Lawrence County, the County obligating itself to pay its share of said cost out of the 25% of the proceeds of the gasoline tax fund received by it which is to set aside, beginning October, 1, 1936, for the purpose of retiring the indebtedness incurred by Lawrence County in the construction and/or maintenance of roads and bridges, as is provided by Act No. 336, approved September 6, 1935, Local Acts, 1935, at page 204.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter in which you ask that I refer to Act No. 336, Local Acts 1935, page 204, approved September 6, 1935, and advise you if the Board of Revenue of your county can, at this time, enter into an agreement with the State Highway Department of Alabama, the substance of which is as follows:

The State Highway Department agrees to build a certain road in Lawrence County, the cost of which will be \$72,000.00, said cost to be borne equally by the State and County, \$36,000.00 by each; and Lawrence County obligates itself to pay the \$36,000.00 which is its share of the cost of said road out of the 25% of the proceeds of the gasoline tax received by it which is to be set aside beginning October 1, 1936, for the purpose of retiring the

indebtedness incurred by the county in the construction and/or maintenance of roads and bridges, as is required by Act No. 336, supra.

In an opinion rendered to you on September 26, 1936, I held that Act No. 336, supra, did not become operative until **October 1, 1936**; that all references in said Act to certain dates in 1935 should be treated as though they were to the same dates in 1936; and that the Board of Revenue of Lawrence County should begin setting aside on **October 1, 1936**, 25% of the proceeds of the gasoline tax received by it to be used for the purpose of retiring the indebtedness incurred by the county in the construction and/or maintenance of roads and/or bridges.

Reference to Act No. 336, supra shows that in the title thereof there is a proviso that the 25% of the proceeds of the gasoline tax required to be set aside by this Act is to be used for the purpose of all county road debts contracted prior to **October 1, 1935**, and that in Section 1 thereof, there is a proviso that this 25% is to be used for the purpose of retiring all county road indebtedness, without any proviso in regard to the time the same was incurred.

Since I have formerly held in the opinion referred to above that all references in the Act to certain dates in 1935 were to be read as though they were the same dates in the year 1936, it necessarily follows that this 25% of the proceeds of the gasoline tax fund received by your county which is to be set aside for the purpose of retiring the indebtedness incurred by the county in the construction and/or maintenance of roads and/or bridges can be and must be used for the retirement of all such indebtedness contracted prior to **October 1, 1936**.

Since the agreement which you wish to enter with the State Highway Department calls for the incurrence by your county of a \$36,000.00 road debt prior to **October 1, 1936**, said \$36,000.00 to be paid from the 25% of the proceeds of the gasoline tax received by your county required to be set aside beginning **October 1, 1936**, for the purpose of paying such indebtedness, by Act No. 336, supra, it is my opinion that your Board of Revenue can enter into such an agreement. I hold that such an agreement, the substance of which is set out above, will be a valid and legal agreement and that the \$36,000.00 indebtedness incurred thereby can be properly paid out of the 25% of the proceeds of the gasoline tax fund received by your county required to be set aside, beginning **October 1, 1936**, for the retirement of the road indebtedness of the county incurred prior to **October 1, 1936**, in the construction and/or maintenance of roads and bridges.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 28, 1936.

Hon. Jas. L. Harris,
Custodian, County School Funds,
Bullock County,
Union Springs, Alabama.

Schools—The fact that the custodian of county school funds is also an officer of the depository bank, does not effect the provisions of the Act No. 60, H. 366 approved March 10, 1933 (General Acts 1933, page 51).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have before me a letter from Mr. G. M. Edwards, President of the First National Bank of Union Springs, Alabama, under date of August 3, 1936, in which opinion is requested as follows:

"In regard to an opinion in the bond matter of Mr. James L. Harris, Custodian, County School Funds, Bullock County, Alabama.

"In the above, I was in your office the other day and you advised me that you would secure for me an opinion on the specific case of Mr. Harris. I stated to you that Mr. Harris, as school custodian, had duly forwarded to the office of the bonding company a transcript from the minutes of the Bullock County School Board and had also forwarded an opinion from your office stating that there would be no bank depository liability where the School Board designated the bank in which the funds were to be placed. The bonding company, however, came back with the inquiry that since Mr. Harris is Assistant Cashier of the bank that even though our bank had been designated as the depository by the School Board, there might be some depository liability against the bond of Mr. Harris.

"As mentioned in person, I am enclosing herein transcript from the minutes of the Bullock County School Board showing wherein Mr. Harris was duly elected by the Board and also transcript showing wherein the First National Bank of Union Springs, Alabama, was designated as depository, and as stated, I would be very glad to have you secure for me an opinion covering the situation of Mr. Harris as being Custodian of County School Funds and also Assistant Cashier in the bank in which the funds are to be deposited."

In my opinion the fact that the Custodian of County School Funds is an officer in the bank designated as County Depository can in no way change his status with respect to his liability as such custodian. Your attention is directed to Act No. 60, H. 366, approved March 10, 1933, (General Acts 1933, Extra Session, page 51) wherein is to be found the following:

"Section 2. Upon the application of the County Tax Collectors, County Treasurers, Probate Judges, Circuit Court Clerks, and/or Registers of the Circuit Court, it shall be the duty of the Court of County Commissioners, Boards of Revenue, or other like governing body of the County to appoint a bank or trust company as a depository in which such officers may deposit monies coming into their hands as such officers; which appointment shall be by proper resolutions spread upon the minutes of such court, Board of Revenue or other governing body. Such court shall from time to time by resolution spread upon its minutes, make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the general laws of the State.

"Section 3. Upon the application of the County Treasurer of School Funds it shall be the duty of the County Board of Education of the County to appoint a bank or trust company as a depository in which said officers may deposit monies coming into their hands as such officers; which appointment shall be by proper resolutions spread upon

the minutes of such County School Board. Such County School Board shall from time to time by resolution spread upon it minutes, make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the general laws of the State.

"Section 4. If any of such funds are dissipated or lost by reason of the insolvency or failure of such bank or trust company appointed as such depository as provided in Sections 2 and 3 hereof, such dissipation or loss shall not constitute a liability on the official bond of such officers nor a liability on the sureties thereon."

You will note that the statements set forth are clear and unequivocal in asserting that any dissipation or loss of funds deposited in the designated depository by reason of the insolvency or failure of such bank or trust company "shall not constitute a liability on the official bond of such officers nor a liability on the sureties thereon." There is nowhere to be found any intimation that the Legislature intended a reservation upon the rule announced when applied to custodians who were also officers of the designated depository.

Therefore, it is my opinion that there is no depository liability against the bond of the custodian, as such, even though he may be officially connected with the depository when the provisions of the foregoing cited Act have been complied with.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 28, 1936.

Hon. Henry S. Long,
Chairman, State Tax Commission,
Capitol.

Attention Mr. Harry Simon, Chief Clerk, License Department.

Licenses—Mattress Manufacturer—Mattress manufacturer receiving and delivering mattresses in other counties than that in which factory is located not liable for additional license in each of said counties.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 1, 1936, in which you request my opinion as follows:

"Your opinion is respectfully requested as to the liability for license under the above schedule under the following statement of facts:

"1. A person engaged in the business as testified in schedule 88 has procured a license in Montgomery County to engage in the business of manufacturing or renovating or cleaning of mattresses. This person goes to adjoining counties to pick up mattresses to bring to his factory here in Montgomery to be renovated, after which he delivers same to the person in the adjoining county from whom he received them:

"(1). Is this person subject to the payment of a license under schedule 88 in the adjoining county?

"(2) Is such person liable for any license under any other schedule in such adjoining county?"

In my opinion, the party mentioned in your inquiry is not subject to the payment of a license for his operations in Counties other than Montgomery County.

Schedule 88 provides as follows:

"Each person engaging in the business of manufacturing cushions, mattresses, pillows and/or rugs and/or the renovating, cleaning or reworking of same, shall pay for the privilege of engaging in such business, fifteen dollars (\$15.00). Provided, however, the license shall be five dollars in towns of 3,000 or less population."

You will note that the license is imposed on persons engaged in the business of "manufacturing * * renovating, cleaning or reworking" of certain articles. The party mentioned in your inquiry does not engage in the manufacturing, renovating, cleaning or reworking of mattresses in any county other than Montgomery. The mere fact that he receives and delivers mattresses etc., in other counties cannot, in my opinion, bring him within the purview of Schedule 88, nor within any other section of the Revenue laws which has come to my attention.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 28, 1936.

Hon. A. G. Teague,
Clerk, Circuit Court,
St. Clair County,
Ashville, Alabama.

Whenever the clerk of the circuit court issued execution as required by law he has performed his full duty in reference to same and is in no wise liable for the sheriffs failure to make the money or properly return the execution.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 4, 1936, in which you request my opinion as follows:

"Just what is required of the Clerk and Register of the Circuit Court in reference to issuing executions before he is released of all responsibility in connection with unpaid judgments and costs?

"Explaining further: If the Clerk issues execution as required by Act No. 157 page 181, Special Session of the Legislature 1936, and makes prompt delivery to the Sheriff, is he released of all liability for any cost

carried by execution? If the Sheriff hand this execution back to the clerk at the expiration of ninety days, with neither 'No property found' nor a satisfaction of the judgment and cost endorsed thereon, but his endorsement of 'Returned for new execution' on the writ, is the clerk responsible for the unpaid judgment and cost, having performed his duty under the Act as referred to above?"

Answering your request above all you are required to do to absolve yourself from any liability as clerk of the Circuit Court is to follow the law as laid down in an Act approved April 21, 1936 (General Acts of Extra Session, 1936, page 181) which is as follows:

"Section 1. That Section 7795 of the Code of Alabama 1923 be, and the same is hereby, amended so as to read as follows: '7795. (4079) (1881) (2883) (3180) (2838) (2423) ISSUE OF EXECUTIONS MUST BE SIGNED AND TESTED. * * * After the lapse of ten days, and within ninety days from the rendition of a judgment or decree, the clerk or register must issue execution thereon in favor of the successful party, unless otherwise directed by the court or the judge presiding at the trial of the cause. The writ must be signed by the clerk or register, and tested on the day it is issued."

"Approved April 21, 1936."

Certainly you are not responsible for the way an execution is handled after it is issued and placed in the hands of the sheriff, through the return you refer to, viz: "Return for new execution" is in fact no return, but you as clerk of the court cannot be held liable for this. You are in the clear so long as you issue execution as required by law.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 28, 1936.

Hon. Howell Turner,
Secretary of State,
C A P I T O L.

(1) Proclamation of Governor in reference to amendment proposed by Act No. 158, H. 294, Reid, is correct and should be followed in printing the ballot.

(2) Clerical errors mentioned in said bill may be corrected.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of September 4, 1936, in which you request my opinion as follows:

"I will appreciate your opinion on the following matter:

"The enclosed Act No. 158, proposing a constitutional amendment, varies in substance in Sections 1 and 3. I refer you to your opinion

of May 16, 1933, in which you advised there should be placed on the ballots that which is set out in the Governor's proclamation, which in that case contained the provisions of Section 1. I also refer you to Volume 226, Alabama Supreme Court Report, page 398, from which you will note it is the opinion that Section 1 of the Act in question at that time conforms with Section 284 of the Constitution. I would also call your attention to the fact that the attached copy of the Governor's proclamation, where it reads 'Provided further, that the adoption of this amendment shall in no wise affect, limit, modify, abridge or impair the power authority or right of said municipal corporation to levy and collect the special school taxes, now or hereafter * * *' does not follow Section 1 verbatim in that the proclamation uses the word 'now' instead of 'nor' as listed in Section 1. Also this proclamation lists the word 'canvassed' instead of 'canvasses'. These words no doubt are clerical errors but they appear in the original bill as such.

"In preparing my certificates to the Judges of Probate should I follow the Governor's proclamation when it departed from the wording of Sections 1 and 3?

"I would also ask you to advise me, according to Sections 284 and 285 of the Constitution, which section contains the substance to be placed on the ballots, and which should I embody in my certificate to the Judge of Probate."

I am of the opinion that the Governor's proclamation does not vary materially from Section 1, and that you may follow the Governor's proclamation. See opinion to Hon. Pete B. Jarman, Jr., Secretary of State, dated May 16, 1933; in re Opinions of the Justices. In re Income Tax Amendment, 226 Ala. 398.

I am of the opinion that the proclamation may properly be placed on the ballot and also embodied in your certificate to the Judge of Probate.

I am of the further opinion that the use of the word "now" for "nor" and the use of the word "canvassed" instead of "canvasses" are merely corrections of clerical errors, and that the corrections should be followed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 28, 1936.

Hon. Riley H. James,
Clerk, Municipal Court of Birmingham.
Third Division,
Birmingham, Alabama.

(1) Execution may issue against the plaintiff for the costs accruing at his instance immediately after the return of an execution against the defendant, marked "no property found" where he is charged with the costs.

(2) Alias execution may issue against plaintiff for costs incurred by him, where former execution for such costs was returned "no property found".

(3) Where plaintiff in original suit has garnishment instituted on judgment and fails in such garnishment, the costs of the garnishment proceedings are chargeable to him and execution for the collection thereof may be issued against the plaintiff.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 23, 1936, in which you request my opinion as follows:

"The Municipal Court of Birmingham was created by an Act of the Legislature of Alabama (1915 Local Acts of Ala., p. 231).

"As Clerk of that Court, I shall greatly appreciate it if you will render an opinion on the following question:

"1. When a suit is filed in the Municipal Court, judgment rendered against the defendant, execution issued on the judgment and returned 'no property found', how long can the Clerk wait before issuing execution against the plaintiff to collect costs incurred by the plaintiff or, in other words, within what time must the Clerk issue execution against the plaintiff to collect cost incurred by the plaintiff.

"2. When a suit is filed in the Municipal Court, judgment rendered against the defendant, execution issued and returned 'no property found,' and thereupon execution is issued against the plaintiff for his costs and returned 'no property found,' can the Clerk thereafter issue alias execution against the plaintiff for costs incurred by it?

3. When a suit is brought in the Municipal Court judgment rendered against the defendant and execution is issued against the defendant and returned 'no property found' and is also issued against the plaintiff and returned 'no property found' and thereafter the plaintiff by process of garnishment etc., unsuccessfully attempts to collect his judgment, can the Clerk again issue execution against the plaintiff in an attempt to collect the additional court costs."

Answering your first inquiry, it is my opinion that as soon as the execution is returned against the defendant marked "no property found," you may at once issue execution against the plaintiff for the costs accruing at his instance. I call your attention to Section 7805, Code of Alabama, 1923, which is as follows:

"Section 7805. When against plaintiff for his costs.—When execution against the defendant is returned 'no property found,' execution may issue against the plaintiff, in the name of the clerk or the register of the court, for all the costs created by him in obtaining his judgment."

It appears from the above section that there is no time limit as to when this may be done after the return of execution "no property found" against the defendant. Therefore, I think, as stated above, such execution may issue at once on such return against the defendant.

Biennial Report, 1922-1924, page 84.

My answer to your second inquiry is in the affirmative. Alias Execution may issue at any time after return of the former execution showing the

costs not collected up to ten years, unless revived. See Sections 7862-7863, Code of Alabama of 1928 (Michie).

My answer to your third inquiry is in the affirmative, that is as to costs of the original case. As I gather it, the costs of the garnishment suit would be against the plaintiff in the first instance as he was the unsuccessful party in this suit, and, of course, execution would be proper against him for the costs at any time.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 28, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Counties—cost of publishing Governor's Proclamation in connection with constitutional amendment authorizing county to float bond issue may be paid from proceeds of sale of said bonds.

Opinion by Assistant Attorney General Screws .

Dear Sir:

I have your letter of August 7, 1936, which is as follows:

"During the 1935 regular session of the Legislature a constitutional amendment was passed authorizing Lawrence County to float \$130,000.00 of Bonds for the purpose of constructing a Court House.

"The law states that the cost of a Governor's Proclamation must be paid by the County concerned in said Proclamation. On March 9, 1936 you rendered an opinion to the Comptroller and to Judge Fleetwood Rice of Tuscaloosa County stating that the expense of advertising the Proclamation should be paid by the counties.

"Has Lawrence County authority to use the proceeds of the sale of the Bonds to pay the cost of publishing said Proclamations?"

I am if the opinion that your inquiry should be answered in the affirmative. The cost in question, in my opinion is a necessary incidental expense to effectuate the bond issue.

In an opinion of this office rendered to the Chairman of the Walker County Commission on November 6, 1934, it was held that the payment of commissions for marketing bonds may be paid out of the proceeds of the sale of said bonds as necessary incidental expenses attached thereto. Reasoning by analogy, the cost of publishing the Governor's Proclamation in connection with the constitutional amendment authorizing the floating of the bond issue is, likewise a necessary incidental expense in connection therewith.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

Feb. 8/1915 - Singleton -

September 29, 1936.

Hon. John R. Matthews,
Clerk, Circuit Court,
Montgomery County,
Montgomery, Alabama.

Where a defendant is sentenced to death and is executed in accordance with said sentence the cost of prosecution may be paid out of the Fine and Forfeiture Fund of the County from which he was sentenced, provided execution has been issued against the defendant or his estate and returned "No Property Found." This would also include the fees of the Clerk for preparing transcript of the case on appeal.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 18, 1936, in which you request my opinion as follows:

"Please advise me of your opinion based on the following facts:

"A defendant was convicted in the Montgomery County Circuit Court for the offense of murder in the first degree and his punishment fixed at death. This case was appealed to the Supreme Court and was affirmed. Execution was issued on the date of the overruling of the application for re-hearing and said execution was returned 'No property found' by the Sheriff. Thereafter the defendant was electricuted. Said execution being issued and returned no property found before electrocution.

"Is the County of Montgomery liable for the Clerk's fees earned, including fees for preparing transcript of appeal?"

Answering your request, I call your attention to Section 4039, Code of Alabama, 1923, as amended by an Act approved February 18, 1927 (General Acts 1927, page 45). This Section as amended has to do with the Fine and Forfeiture Fund of the various counties and is as follows:

"1. That Section 4039 of the Code of 1923 be and hereby is, amended so as to read as follows to-wit: Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the state witnesses, the County Treasurer of such county must pay the fees of the officers of the Court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found,' or in cases in which the State enters a nolle prosequi, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant, unless the payment or distribution of such funds are otherwise provided for. This section shall be held to apply to all fees of officers of the trial court arising on an equal by the defendant to the Supreme Court or the Court of Appeals, in cases where the judgment of the trial court is reversed and a new trial allowed, or the defendant ordered discharged. It shall also apply in appealed cases where the defendant has appealed from a conviction and sentenced to the State penitentiary, and the conviction is affirmed, to such part of the fees of the officers of the trial court, arising on the appeal, as are not paid

from the convict fund under Sections 3667 and 3668 of the Code, and execution for such unpaid part of such fees having first been issued against the defendant and returned 'no property found'. It shall further apply to the fees of the officers of the trial court, arising on an appeal, in cases where the defendant has appealed from a conviction, the punishment fixed being otherwise than imprisonment in the state penitentiary, and the judgment of the trial court is affirmed, provided the defendant be first proved insolvent by the return of the execution 'no property found.'

"2. Should any part of this Act be declared unconstitutional such decision shall not affect the remaining parts thereof; but, on the contrary, the same shall remain of full force and effect.

"3. Provided that no fees of a Circuit Solicitor or trial tax whether heretofore accrued or hereafter accruing, shall be taxed against or paid out of the fine and forfeiture funds of any county.

"Approved Feb. 18, 1927."

You will note this section says among other things:

"* * * or in which defendants have been convicted and have been proven insolvent by the return of execution 'no property'."

The defendant being sentenced to death, if the cost of the case is to go against the Fine and Forfeiture Fund of the County execution must have issued against the defendant and returned "No property found". Of course this could have been done at any time after his case was affirmed by the Supreme Court and motion for rehearing was overruled. After he was executed the only way execution could issue against his estate would be by the appointment of an administrator. The cost in the case of this character cannot be paid under Section 3667, Code of Alabama, 1923, for the reason this section applies only to cases sentenced to the penitentiary. I might add here that under an Act approved August 6, 1907 (Local Acts, 1917, page 299) your Fine and Forfeiture Fund has been abolished and consolidated with your General Fund in Montgomery County. Therefore, the fees for the above service will come from the General Fund of the County and is paid as costs in other criminal cases for which the County is liable.

As to your last request, i. e. is the County of Montgomery liable for the clerk's fees earned, including fees for preparing transcripts for the appeal? What I have said above relative to your first request, I think answers this but to strengthen what I have said above relative to your first request I call your attention again to Section 4039, Code of Alabama, 1923, supra, where it says:

"It shall further apply to the fees of the officers of the trial court, arising on an appeal, in cases where the defendant has appealed from a conviction, **the punishment fixed being otherwise than imprisonment in the State penitentiary**, and the judgment of the trial court is affirmed, provided the defendant be first proved insolvent by the return of the execution 'no property found'."

With the above quotation from Section 4039, supra, when followed would authorize the collection of your fees on appeal of a case to the Supreme Court including preparing transcript.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 29, 1936.

Hon. Haygood Paterson,
Sheriff, Montgomery County,
Montgomery, Alabama.

Sheriff—Elections notice constitutional amendments.

Sheriff in giving notice under Section 447 of the Code of 1923, is not required to publish such amendments in full but should give the substance or subject matter of each sufficient to clearly indicate the nature of each amendment.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of September 28, 1936, in which you request my opinion as follows:

"Please advise me whether or not in carrying out Section 447 of the Civil Code of Alabama I will have to set out constitutional amendments in full, or give a brief description of the subject, or in other words, does the word 'subject' in the last sentence of the above section require me to set out the constitutional amendments in detail. * * *

"I would like to have an opinion by Tuesday afternoon on this question as I have to give the notice to the printer by Wednesday."

In reply, I call to your attention Section 285 of the Constitution which states in part:

"Upon the ballots used at all elections provided for in Section 284 of this Constitution the **substance or subject matter** of each proposed amendment shall be so printed that the nature thereof shall be clearly indicated."

Section 447 to which you refer requires the sheriff to give notice at least 30 days before each election and concludes as follows:

"Such notice shall consist only of the date of the election and the officers to be voted for or **subjects to be voted on.**"

Section 480 of the Code following the constitutional provisions provides that the substance or subject matter of each proposed amendment shall be so printed (on the ballot) that the nature thereof shall be clearly indicated.

Section 526 providing for the counting and return of the votes on constitutional amendments says:

"The vote on an amendment proposed to the constitution shall be counted and return made thereof as is counted and returned the vote for members of the legislature, the amendments if more than one, being designated by **substantially the language** used to designate them on the official ballot."

It appears by Section 447, that you are required to give notice of "subjects to be voted on." What meaning is to be given to the word "subjects" as there used?

In my opinion, reading all these Sections together, it is not the intention of the Legislature that when you publish the notice, you should set out the

amendments in full, but it does seem that the notice should be sufficient to advise the public and particularly the qualified electors, the substance or subject matter of each sufficient to clearly indicate the nature of each amendment.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 29, 1936.

Hon. Chas W. Lee,
State Comptroller,
Capitol.

Firearms Act—

Comptroller authorized to deliver to the Sheriff all application blanks for permits in his county required by said act.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter stating:

"On August 31, 1936 you rendered an opinion to Hon. Howell Turner, Secretary of State, that the issuance of forms necessary for carrying out the provisions of the Uniform Firearms Act was the duty of the State Comptroller.

"Acting under this opinion shall I furnish applications for Pistol License to the several Sheriffs only? The Sheriffs are the chief law enforcement officers of the State and even though the law provides that Probate Judges and Chiefs of Police may issue such license, should not this office issue to and hold responsible for, all pistol license forms issued?"

As I understand your letter, as an administrative measure you proposed to send all application for permits under the Uniform Firearms Act to the Sheriffs of the various counties, the Sheriffs to distribute such applications to and hold accountable to him therefor, the other officers authorized to issue such permits, and he, in turn, to account to you for all applications.

From reading the entire act, and considering its purely police nature, I think the procedure you propose is authorized, and will promote the general purposes of the act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General

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"A"

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